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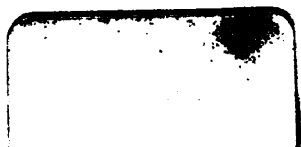
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LAWRANCE'S
BENGAL LAW REPORTS

BEING
DECISIONS OF THE HIGH COURT AT
CALCUTTA,

AND
OF HER MAJESTY'S MOST HONORABLE
PRIVY COUNCIL
ON
INDIAN APPEALS.

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JUDGES OF THE HIGH COURT.

HON'BLE SIR RICHARD COUCH, *Knight, Chief Justice.*

„ G. LOCH, (on leave),
„ H. V. BAYLEY,
„ F. B. KEMP,
„ L. S. JACKSON,
„ J. B. PHEAR,
„ A. G. MACPHERSON,
„ E. JACKSON, (on leave),
„ W. MARKBY,
„ F. A. B. GLOVER,
„ D. MITTER,
„ W. AINSLIE,
„ C. PONTIFEX,

Puisne Judges.

MR. PAUL, *Officiating Advocate-General.*

„ KENNEDY, *Standing Counsel.*

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[ORIGINAL CIVIL.]

Before Mr. Justice Macpherson.

**HAZARI MULL NAHATTA AND ANOTHER v. SOBAGH MULL
DUDDHA.**

1872
April 12.

Hundis, Property in—Hundis sent to Agent for Realization.

S. R., the plaintiffs' agents in Calcutta, accepted hundis for Rs. 12,000 drawn upon them by a branch house of the plaintiffs' firm, and the plaintiffs at different times sent to S. R. hundis amounting in value to Rs. 11,400, with instructions to realize them, and to apply the proceeds towards payment of the Rs. 12,000. S. R. had paid Rs. 7,000 of this amount, and they had realized Rs. 6,400 out of the Rs. 11,400, when they stopped payment. At that time two unmatured hundis, for Rs. 2,500 each, remained in their hands, and these they endorsed over to the defendant after maturity in trust for their creditors. In an action by the plaintiff against the defendant to recover the two hundis.

Held, that the hundis, having been sent to S. R. for the special purpose of enabling them to meet their acceptances for Rs. 12,000, remained the property of the plaintiffs subject to a lien of S. R. for Rs. 600,

THIS was a suit to recover possession of two hundis for sicca Rs. 2,500 each, or their value and damages for their detention, and for an injunction restraining the defendant from negotiating or otherwise alienating them. The hundis were drawn by two up-country firms upon firms in Calcutta, and were made payable to the plaintiffs 61 days after date. The plaintiffs sent them without endorsement to their Calcutta agents, Suratram Rybhun, with instructions to procure their acceptance, and to realize them at due date. Suratram Rybhun had previously to this accepted hundis to the value of Rs. 12,000 drawn upon them by a branch house at Lushkur of the plaintiffs' firm; and the plaintiffs had at different times sent them hundis amounting in value to Rs. 11,400, the two hundis, the subject of the present suit, being among the number, with instructions to realize them

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and apply the proceeds towards payment of the Rs. 12,000. Of the hundis so sent them for realization, Suratram Rybhun had realized Rs. 6,400, and they had paid Rs. 7,000 out of the Rs. 12,000 for which they had given their acceptances, when they stopped payment, and the plaintiffs thereupon became liable to the holders of the remaining acceptances. The two hundis sued upon had not then matured and remained unpaid in the hands of Suratram Rybhun. Shortly after stopping payment, Suratram Rybhun convened a meeting of their creditors with a view to effecting some compromise with them, and it was then agreed that they should endorse the two hundis over to the defendant, as a member of the firm of Sadasuk Udooy Mull Sobagh Mull, and that the defendant should realize the hundis, and distribute the proceeds rateably among the Calcutta creditors of the firm of Suratram Rybhun. Suratram Rybhun's gomasta accordingly endorsed and delivered the hundis to the defendant. The plaintiffs demanded the two hundis from the defendant, but the latter declined to give them up on the ground that he had received them from a committee of creditors, without whose authority he could not part with them.

Mr. Branson and Mr. Evans for the plaintiffs.

Mr. Marindin and Mr. Goodeve for the defendant.

The arguments are sufficiently stated in the judgment.

MACPHERSON, J.—This action is brought to recover two hundis, each for sicca Rs. 2,500. The one is dated the 3rd day of the dark side of the moon in the month of Jaishta of the Sambat year 1928, corresponding with the 7th May 1871, and drawn by the firm of Mulchand Dhanrup Mull of Jeypore on the firm of Srikissen Das Balkissen of Calcutta, in favor of the plaintiffs, payable 61 days after date; the other is dated the 3rd day of the light side of the moon in the same month and year, corresponding with the 22nd May 1871, drawn by the firm of Ramratan Goberdhun Das of Jeypore on their Calcutta firm, and payable to the plaintiffs 61 days after date.

These hundis, without having been endorsed by the plaintiffs, were sent by them to Calcutta to the firm of Suratram Rybhun, who were their agents and bankers here. Suratram Rybhun got these hundis accepted by the firms on which they were drawn; but, before they fell due, Suratram Rybhun stopped payment. After the bills became due, a meeting was held at Suratram Rybhun's place of business, which a number of the creditors and neighbours of the firm attended; and in compliance with a resolution come to at that meeting, Suratram Rybhun's gomasta endorsed the two hundis over to the defendant, who undertook to hold them for the benefit of the Calcutta creditors of Suratram Rybhun.

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The plaintiffs claim the hundis as having been their property at the time when they were endorsed over to the defendant; and the principal question is, to whom did the hundis belong at that time?

This question depends on the circumstances under which they were sent by the plaintiffs, and under which they were received and held by Suratram Rybhun.

The plaintiffs had long had dealings with Suratram Rybhun; and it appears on the evidence that there were separate accounts kept of separate and independent transactions between different firms of the plaintiffs (who had various branch firms carrying on business at different places up-country) and Suratram Rybhun. The bills, the subject of suit, were two of a series, amounting in value to Rs. 11,400 sent down by the plaintiffs to Suratram Rybhun to enable that firm to meet bills for Rs. 12,000 drawn on them by the plaintiffs' firm at Lushkur (Gwalior.) The plaintiffs' case throughout has been that these two hundis were sent in respect of this particular transaction of Rs. 12,000, and that case, I think, is proved by the evidence of Suratram Rybhun's gomasta. It appears to me that these bills, being sent down for the special purpose of enabling Suratram Rybhun to take up the hundis for Rs. 12,000 drawn by the Lushkur firm, still remained the property of the plaintiffs, and were in the hands of Suratram Rybhun merely as agents of the plaintiffs to obtain payment when due, so as to provide for the hundis for Rs. 12,000.

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The case of *Giles v. Perkins* (1) shows the principle on which the parties were dealing. In that case Lord Ellenborough, C. J., says:—"Every man who pays bills not then due into the hands of his banker places them there, as in the hands of his agent, to obtain payment of them when due. If the banker discounts the bill, or advances money upon the credit of it, that alters the case; he then acquires the entire property in it, or has a lien on it *pro tanto* for his advance." The remarks of Bayley and Holroyd, JJ., in the case of *Thompson v. Giles* (2) also seem applicable. Bayley, J., says:—"It has been argued for the defendants that we must infer an agreement to have been made between the banker and his customer, that as soon as the bills reached the hands of the former, the property should be changed. Undoubtedly, if there were any such bargain, the defendants would be entitled to our judgment; but if there be no such bargain, then the case of customer and banker resembles that of principal and factor, and the bills remaining in specie in the banker's hands will, notwithstanding the bankruptcy, continue the property of the customer; *Scott v. Surman* (3) and *Bolton v. Puller* (4) establish that as a general rule." And Holroyd, J., says:—"I am of opinion that the bills in question did not, under the circumstances of this case, become the property of the bankers, and that the defendants, therefore, have not any sufficient answer to this action. It is perfectly clear as a general rule, and indeed is not disputed on the present occasion, that, if a customer pay bills into a banker's hands, although it gives him a right to expect that his drafts will be honored to the amount of the bills paid in, yet the property in the bills is not altered; they still remain the property of the customer, although the banker may have a lien to the extent of his advances. The defendants must, therefore, show such special circumstances as will operate to change the property, and vest it in the assignees, either as standing in the situation of the bankrupts,

(1) 9 East., 11.

(2) 2 B. & C., 422.

(3) Willes, 400.

(4) 1 B. & P., 539.

or by virtue of 21 Jac. 1, c. 19, s. 11." Then he says :—"Now 1872
 it is hardly to be supposed that the bankers intended to debit HAZARI MULL
 themselves presently with the whole sum that was to be NARHATTA
 received in future. In order to change the property, it must v.
 be shown that the bankers bought the bills, or discounted them, SOBHAGH MULL
 which is indeed the same thing; then the customer might have DUDHIA.
 immediately sued the bankers for the price which they agreed
 to give for the bills, but still retained in their hands; and if
 the customer did not endorse the bills, and they were afterwards
 dishonored, the bankers under such circumstances would have
 no remedy against him."

It is clear that Suratram Rybhun would have been the very
 last to admit that they would have been liable for the full
 amount of the hundis, if they had been dishonored on the due
 date. There is nothing to show that Suratram Rybhun treat-
 ed these bills as cash. The only thing approaching to evidence
 of that is the letter of Suratram Rybhun's gomasta set out in
 paragraph 4 of the plaintiffs' written statement, in which he says
 after acknowledging receipt of one of these hundis, "I will credit
 it to you after it has been accepted." But I regard this merely
 as indicating that, if the bill was accepted, he would (so far as
 the amount of this hundi went) be ready to pay the bill for
 Rs. 12,000 drawn upon him. The case is presented to the
 Court in a very naked form. We have no books of account
 before us. We do not know with absolute certainty how the
 bills were intended to be dealt with: but I have myself no doubt
 they were intended to be treated in the same manner as the bills
 in the two cases cited.

Mr. Marindin says that Suratram Rybhun had given con-
 sideration for the bills, inasmuch as they had accepted the bills
 drawn upon them. But what Suratram Rybhun had to do
 was not only to accept but to pay. If they had accepted and
 paid the bills, that would have no doubt formed a valuable con-
 sideration; but the mere acceptance forms no consideration,
 when it is proved that Suratram Rybhun did not pay these
 bills, but returned them unpaid, and having advanced nothing on
 them. It is admitted that Suratram Rybhun paid the bills of
 the Lushkur firm to the extent of Rs. 7,000, while they accepted

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bills to the extent of Rs. 12,000. The total amount which they received from the plaintiffs (including the two hundis now sued for) was Rs. 11,400; so that they paid Rs. 600 more than the value of the other hundis sent. That being so, they had a lien on these two bills for Rs. 600. I think it is clear from the evidence, and it is almost admitted by the plaintiffs, that, when Suratram Rybhun stopped payment, they had a lien on these bills to the extent of Rs. 600.

So far I deal with the case as between Suratram Rybhun and the plaintiffs.

Mr. Marindin, however, contends that the bills were endorsed over for a good consideration (to provide for the body of the creditors of Suratram Rybhun), and that the defendant is entitled to hold them, even if Suratram Rybhun themselves could not have done so. But the defendant took no higher title than Suratram Rybhun had; for the endorsement was after due date, and the circumstances under which Suratram Rybhun held the hundis were known.

The plaintiffs are entitled to recover the bills, subject to the lien for Rs. 600, and to costs on scale No. 2.

Attorneys for the plaintiffs: Messrs. *Beeby and Rutter*.

Attorney for the defendant: Mr. *Linton*.

[APPELLATE CRIMINAL.]

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

QUEEN v. CHANDRA JUGI (APPELLANT).*

1872 *
April 9.

Power of a single Judge of the High Court—Appeals in Criminal Cases.

A Judge of the High Court, sitting alone on the Appellate Side, has the power to hear and dispose of appeals in criminal cases.

THE Sessions Judge of Jessore, not concurring with the assessors, found the prisoner Chandra Jugi guilty of an attempt to commit murder, and sentenced him to rigorous imprisonment

* Criminal Appeal, No. 143 of 1872, from an order of the Sessions Judge of Jessore, dated the 18th December 1871.

for the term of seven years. The prisoner, on the 18th December 1871, presented a petition of appeal from the conviction, which petition was heard and rejected on the 27th January 1872 by Glover, J., sitting alone.

On the 15th February 1872, Baboo *Bhairab Chandra Banerjee* for the prisoner presented another petition of appeal from the said order. This appeal came on for hearing before a Division Bench of the High Court (Couch, C.J., and Ainslie, J.)

Baboo *Bhairab Chandra Banerjee*, for the prisoner contended that there was nothing in the Criminal Procedure Code expressly authorizing a single Judge of the High Court to try and reject criminal appeals, but the practice had been for a single Judge to hear criminal appeals in the first instance, and to refer them to another Judge if it was necessary either to modify or reverse the sentence of the lower Court. This practice was adopted by the High Court, and continued to be in force till 1867 or 1868, since which time all such appeals have been heard by a Division Bench consisting of two Judges. In 1869 Peacock, C. J., questioned the authority of a single Judge to decide criminal appeals, and re-tried certain cases which had been so decided. Under 24 & 25 Vict., c. 104, s. 13, the High Court has the power by its own Rules to provide for the exercise of appellate criminal jurisdiction by a single Judge; but as no rule seems to have been made by the High Court since 1869 conferring upon a single Judge the power of exercising criminal appellate jurisdiction, the order passed by Glover, J., rejecting the appeal, was passed without jurisdiction. Cl. 36 of the letters Patent of 1865 does not confer any authority upon a single Judge to dispose of such cases, unless there be a Rule of Court authorizing the same, and a single Judge be appointed under such Rule to dispose of such cases. As a matter of practice, however, it must be admitted that, since November 1870, single Judges have tried criminal appeals; but such a practice does not confer any authority, and the decisions passed by Judges sitting singly might be questioned.

Couch, C. J.—In this case the prisoner presented a petition of appeal to this Court from a conviction by the Sessions Judge,

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which was disposed of on the 27th of January by Glover, J., sitting alone. The learned Judge rejected the petition. The petitioner has now his pleader presented another petition, which was filed on the 15th of February, within the time allowed by law ; and therefore the question arises whether the first petition was properly disposed of. If it was, the Court will not allow the matter to be re-opened.

Now the 13th section of the 24 & 25 Vict., c. 104, for constituting the High Court, enacted that the exercise of the original and appellate jurisdiction vested in the Court by one or more Judges, or by Division Courts constituted by two or more Judges, was to be provided for by rules of the Court. I have not found that any formal Rules under this section were passed until the 1st of January 1865 ; but the practice of disposing of some business by one Judge and of other business by a Division Court existed from the time of the institution of the High Court, which on the Appellate Side, for the most part adopted the practice of the Sudder Court. But, on the 1st of January 1865, a Rule was made by which it was declared that all Rules, which at the time of the abolition of the Sudder Court were in force in that Court, were to extend, so far as they were applicable, and as nearly as might be, to all proceedings of appellate jurisdiction in the High Court, not being cases of appeal from the ordinary original civil jurisdiction of the Court except so far as such Rules were contrary to the said 24, & 25 Vict., c. 104, or to the Letters Patent, or as the same might have been or should thereafter be altered or modified by the Court. Those words are very important ; the Rules of the Sudder Court were to be in force, except so far as the same might have been altered or modified by the Court before that time. Now it appears that there was a Rule of the Sudder Court of the 27th of April 1854, which required that all criminal cases, whether appeals or referred cases, should be tried before a Bench of at least two Judges. But on the 14th of June 1854, a modification of that Rule was made, and it was then provided that, "if, by accident or indisposition, one of the Judges, forming a double Bench for the trial of Nizamut cases, is prevented from attending the Court, it shall

be competent to his colleague, sitting alone, to take up and dispose of any appeals or referred criminal trials, in which the opinion of the Sessions Judge agrees with the fatwas of the Law Officer, or the verdict of the jury or assessors who tried the case, reserving for the consideration of his colleague any case in which he may entertain doubt, or may be inclined to differ from the Sessions Court."

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In the Rules made on the 1st of January 1865, which were continued in force by a Rule made on the 2nd of January 1866, after the issuing of the Letters Patent now in force, there is another Rule (No. 30) which says that "appeal on the criminal side of the appellate branch of the Court, which are in the first instance heard before one Judge, may, if he think fit, be referred to such Division Court." And the previous Rule (No. 29) is that "a Division Court for the hearing of criminal appeals may consist of two or more Judges." This Rule, 30, shows that, either in the time of the Sudder Court or of the High Court, a practice had existed of criminal appeals being in the first instance heard before one Judge. The language of the Rule clearly shows this. It recognizes it as a practice, which was then in existence, and provides that the Judge may, if he think fit, refer the appeal to the Division Court. Therefore, whatever might have been the Rule of the Sudder Court, it had, before the passing of the Rules of the 1st of January 1865, been altered or modified so as to allow of criminal appeals being heard in the first instance before one Judge. Even if that were not so, this Rule, 30, might be considered as implied by allowing appeals so to be heard, although it does not in terms say that they shall be. By providing that the Judge may refer appeals to a Division Bench, it impliedly authorizes him to hear them in the first instance.

There is really, then, a Rule of this Court made under the authority conferred upon it by the 13th section of the Act constituting the Court, allowing a single Judge in the first instance to hear criminal appeals; and the papers which we have got showing what took place in the matter when it came before Sir Barnes Peacock, confirm the view of what was the practice of the High Court at the time the Rules of 1865 were made.

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There is a minute of Sir Barnes Peacock dated the 8th of February 1869, in which, speaking of what the practice had been, he says :—" As criminal appeals were formerly heard and determined by one Judge of the Sudder Court, except in cases in which the order had to be signed by two Judges under s. 420 of the Code of Criminal Procedure, I have thought it right to appoint each of the Judges of the 3rd and 5th Benches, sitting alone, to hear and determine criminal appeals."

The appointment of four of the Judges to sit singly to hear criminal cases was made by an order of the same date. That appears to have been objected to as being an exercise of a power which did not belong to the Chief Justice under the Act of Parliament. The power of the Chief Justice was not to make a Rule that criminal appeals should be tried by a single Judge ; but that if there was Rule of the Court to that effect, he was to determine what Judges should sit to hear them. And his attention having been called to that, Sir Barnes Peacock, in a minute dated the 12th of February 1869, says :—" I find that there was a Rule of the late Sudder Court under which all appeals in criminal cases and cases for revision were required to be heard before two Judges. I do not find that that Rule was ever revoked. Under these circumstances, I doubt whether the Rule of this Court which provides that all such business, as was formerly heard and determined by one Judge of the Sudder Court, may be heard and determined by one Judge of the High Court, authorizes the appointment of one Judge to hear criminal appeals or revisions." And he revoked the order which he had made on the 8th of February.

Now it is to be observed that the learned Chief Justice appears not to have had present to his mind the Rule 30 at all. He does not refer to it, and he assumes that the matter was governed by the Rule of the Sudder Court which required that criminal appeals should be heard before two Judges. And that Rule never having been revoked, he considered that every criminal appeal must be heard by two Judges. But there was the circumstance which appears in his own minute, that it had been the practice in the Sudder Court for one Judge to hear criminal appeals ; and there was the Rule 30 showing that the

High Court had adopted that practice. I think that Sir Barnes Peacock if he had had his attention called to Rule 30, and the undoubted practice for one Judge to hear criminal appeals, would not have considered that a single Judge sitting alone had no power to try criminal appeals. He had exceeded the power of the Chief Justice in making the Rule that single Judges should sit alone to hear criminal appeals. But these papers do not show that the Rules of the Court did not and have not allowed criminal appeals to be disposed of by single Judges. And it appears that from November 1870, if not from the constitution of the Court, single Judges have constantly heard appeals in criminal cases, and disposed of them, as was done by Glover, J., in this case. I think the learned Judge had power to reject the former petition, and therefore we cannot allow the second petition to be considered.

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Appeal dismissed.

[ORIGINAL CIVIL.]

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Macpherson.

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April 3.

S. M. NISTARINI DAS (PLAINTIFF) v. MAKHANLAL DUTT AND
ANOTHER (DEFENDANTS).

Hindu Law—Maintenance of Widow—Declaratory Decree—Raising Issues not raised by Pleadings—Relief—Security for Costs of Appeal—Act VIII of 1859, s. 342.

In a suit by a Hindu widow for a declaration of her right to maintenance out of her husband's estate which had been mortgaged to the defendant by the heir, the plaintiff prayed "that the rights of the plaintiff over the estate of her husband by way of maintenance, and for the expenses attendant on the marriage of her daughters, might be ascertained and declared; that it might be declared that the defendant took the mortgage subject to the plaintiff's right to maintenance and right to such expenses as aforesaid; that for such purpose all proper accounts might be taken; for an injunction; and for such further or other relief as might be necessary." No specific sum was asked for maintenance, nor was it stated on what portion of the estate the maintenance was sought to be charged, nor that the defendant took with notice of the plaintiff's assertion of her rights. The lower Court held that the suit ought to be dismissed as praying only for a declaration of right. No alteration in the form of the suit or in the issues in this respect was

I. L. R.
1 Cal. 371.
2 Cal. 315.

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proposed for the plaintiff. *Held*, on appeal, that the Judge ought not to have dismissed the suit, but to have framed issues for the purpose of determining what should be allowed for the maintenance of the plaintiff and the expenses of the marriages, if the plaintiff should be found entitled to them. Where a plaintiff mistakes the relief to which he is entitled in his special prayers, the Court may afford him the relief to which he has a right under the prayer for general relief, provided it is such relief as is agreeable to the case made by the plaint.

THIS was an appeal from a decision of Mr. Justice Markby dated 26th January 1872.

The plaint stated that one Gopal Chandra Dutt, a Hindu inhabitant of Calcutta, died on 21st November 1864 intestate, leaving an only son, the defendant Makhanlal, his sole heir and legal personal representative according to Hindu law, and leaving also a widow, the plaintiff, and three unmarried daughters, Ramanmani, Anandmani, and Saratmani; that with the exception of an undivided one-third share in the ancestral family dwelling-house in Calcutta of the value of Rs. 3,500 or thereabouts, Gopal Chandra Dutt left no effects out of which the maintenance of the plaintiff and the other dependent members of the family could be defrayed; that, on or about 26th November 1870; and shortly after the defendant Makhanlal had attained his majority, a partition into three equal parts of the joint ancestral house was come to by the defendant Makhanlal and his co-sharers, by virtue of which one equal third part was allotted to Makhanlal, and had since been held by him as his own separate estate; that sometime after the death of Gopal Chandra, the plaintiff being unable, owing to the then minority of Makhanlal, to procure funds for the purpose of defraying the expenses attendant on the marriages of her two eldest daughters by mortgage or sale of the estate which had descended to Makhanlal, raised the required sum, Rs. 2,500, by the sale of her own personal jewels and ornaments which formed her stridhan or separate estate; that shortly after the partition of the property, the defendant, who, the plaintiff alleged, was extravagant and wasteful in his habits, executed a mortgage of his one-third share in the family dwelling-house to the defendant Chandra Mohun Sur to secure the repayment of Rs. 2,000, with interest; that the plaintiff was unaware of the amount of the considera-

tion (if any) for the mortgage, but she alleged that it was executed without her knowledge or consent, and without any justifiable necessity ; that except the one-third share of the family dwelling-house, Makhanlal was utterly devoid of means or money wherewith to support the plaintiff and her unmarried daughter, or to provide them with any dwelling-house, or to defray the expenses incurred by the plaintiff on the marriage of his two sisters, or which would be incurred on the marriage of her youngest daughter ; and that, notwithstanding this, Makhanlal threatened and intended to sell his one-third share of the family dwelling-house, and that the defendant Chandra Mohan Sur took the mortgage with notice of the plaintiff's rights therein. The plaintiff submitted that her right of maintenance and her right to be recouped the expenses properly incurred by her about the marriages of her two daughters as well as her right to be provided with the expenses necessary for the due performance of the marriage of her youngest daughter, constituted a first charge on the premises comprised in the mortgage to the defendant Chandra Mohan Sur. She prayed that these rights might be declared ; that it might be declared that Chandra Mohan Sur took the mortgage subject thereto ; that for such purpose all proper accounts might be taken ; that the defendant Makhanlal might be restrained by injunction from alienating, dealing with, or disposing of the one-third share of the dwelling-house, and for such further or other relief as might be necessary.

The defendant Chandra Mohan Sur, in his written statement stated that, on the partition of the family dwelling-house, Makhanlal's one-third part thereof had been valued at Rs. 4,109-6-1 ; that by mortgage dated 3rd April 1871, Makhanlal conveyed his one-third share to one Kaliprasad Chatterjee to secure the re-payment of Rs. 350 borrowed by him from Kaliprasad ; that on 26th May he mortgaged it to Kaliprasad for a further sum of Rs. 713 ; that in June 1871, Makhanlal requested the defendant Chandar Mohan to lend him Rs. 2,000 on the security of his one-third share in the house, and stated that he required the money to pay off Kaliprasad and other debts ; that Makhanlal then informed him that his mother was dead, and his sisters married ; that he thereupon agreed to advance the sum required, and

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Makhanlal, on 17th July 1871, executed a mortgage to him, Chandra Mohan, of his one-third share in the house as security for such advance ; that he had no notice of the plaintiff's claim or position before the execution of the mortgage, and he was informed and believed that the plaintiff did not, during the subsistence of the prior mortgage, make any such claim. He submitted that his mortgage was good and valid, and not subject to any claim of the plaintiff ; that the plaintiff's claim in respect of the marriages of her daughters was absurd ; that if there were any right to have marriage expenses raised out of the property (which right the defendant did not admit), such right was the right of the daughters, and not of the plaintiff, and the plaintiff had no cause of action in respect of the same ; that on the plaintiff's own statement enough would remain after satisfying this defendant's mortgage to provide for the maintenance of the plaintiff ; that, even if there were such right in the daughters to have the marriage expenses out of the estate, yet the plaintiff would not, by voluntarily paying sums on the marriage of the daughters, acquire any charge or lien on the estate for the same ; that there was the plaintiff's own statement of the destitute state of the family, as appeared on an urgent necessity for the raising of money on the estate, and the sum raised was a reasonable one ; that the plaint disclosed no cause of action or title to relief against him ; and that the suit ought to be dismissed with costs.

Mr. Lowe, Mr. Evans, and Mr. Bonnerjee for the plaintiff.

Mr. Marindin and Mr. Branson for the defendant Chandra Mohan Sur.

The defendant Makhanlal was in Court, but had put in no written statement. (The only matter in which he was separately concerned was as to the restraint on future alienation.)

Mr. Lowe opened the case, and proposed the following issues on behalf of the plaintiff:—

1st—Is the plaintiff entitled to such rights over the estate of her husband Gopal Chandra Dutt, upon the estate coming to the hands of Makhanlal Dutt, as are stated in the plaint?

2nd.—Whether the defendant Chandra Mohan Sur took the property subject to such right ?

3rd.—Whether the defendant Chandra Mohan Sur took the property with notice of the plaintiff's right to maintenance ?

4th.—Whether the defendant Chandra Mohan Sur took the property with notice of the plaintiff's claim to be recouped expenses incurred for the marriage of the plaintiff's sisters ?

5th.—Whether the plaintiff is entitled to any and what sum out of the said estate for the marriage expenses of the youngest daughter of Gopal Chandra Dutt ?

6th.—Whether there was any legal necessity for the alienation by Makhanlal Dutt to Chandra Mohan Sur ?

7th.—Whether the mortgage was *bonâ fide* and for valuable consideration ?

Mr. Marindin took a preliminary objection that the plaint disclosed no cause of action. The suit is a merely declaratory one. Nothing specific is asked for. The widow's maintenance is not a charge on the estate of her husband in the hands of an alienee without notice, at least by the law of Bengal—*Srimati Bhagabati Dasi v. Kanailal Mitter* (1). The heir is primarily liable for the maintenance of the widow, it is a charge on him, not on the estate—*Ram Churn Tewares v. Mussamat Jassoda Koonwur* (2); and *per* Peacock, C.J., in *Khetramani Dasi v. Kashinath Das* (3). In *Heeralal v. Mussamat Kousillah* (4), the purchaser had express notice of the widow's claims; but in the present case the plaint does not show that the defendant had notice of the assertion of the widow's right to maintenance, or that she actually asserted it. As to the marriage portions of the daughters, that is their own right, not the plaintiff's, and they ought to have been made parties. No injury has accrued to the plaintiff, and no probable injury is shown by the plaint; the suit is brought merely in anticipation of possible injury—*Jackson v. Turnley* (5), *Omars Sulima Bibes v. Luckes Prea*

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(1) 8 B. L. R., 225.

(2) 2 Agra H. C., 134.

(3) 2 B. L. R., A. C., 15, at p. 35.

(4) 2 Agra H. C., 42.

(5) 1 Drewry, 617.

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v. (1) 7 B. L. R. 617.
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Mr. Justice Markby.

See also 15 B.L.R. 79. RANI ANAND KUMARI AND OTHERS
 (SOME OF THE DEFENDANTS), APPELLANTS, v. THE GOVERNMENT (PLAINTIFF) AND KHITU ROY GHATWAL (DEFENDANT), RESPONDENTS.*

Declaratory Decree—Act VIII of 1859,
s. 15—Ghatwal

THIS was suit by the Government of India claiming the right to re-instate a ghatwal in the possession of Mouza Korinjorah, in Pergunnah Chutna.

The plaint stated that, on the 29th Chaitra 1237 (9th April 1831), Lalmoohan Banerjee, the predecessor of the patnidar defendant, in collusion with the predecessor of the zemindar defendant, obtained a patni talook of the village in dispute; but having failed to obtain possession of it in consequence of the opposition of the ghatwal, who was in rightful possession at that time, he had instituted a suit and obtained a decree, and on the strength of it had taken possession of the village in 1834, ejecting the ghatwal. The defendants had ever since been in possession to the great injury of the public service and the safety of persons and property.

The defendants, Godadhur Banerjee and others, the patnidars, stated (*inter alia*) that they and their ancestors having been in possession for more than 60 years, the suit was barred by lapse of time.

The defendants, Madhusudan and others, the dur-patnidars, set up in their defence (*inter alia*) that the suit was barred by lapse of time, and by s. 2, Act VIII of 1859.

The Principal Sudder Ameen held that the suit was not barred by lapse of

time, nor by s. 2, Act VIII of 1859. On the merits he found that the zemindari of Pergunnah Chutna was liable to an obligation of police service so long as Government required the service of ghatwal; and he declared the right of the Government to re-instate a ghatwal in the possession of Mouza Korunjorah as a ghatwali tenure, liable to be appropriated to the use of the ghatwal for the time being.

The defendants appealed to the High Court.

Mr. Money (Baboo *Rameschundra Mitler* and *Bansidhar Sen* with him) for the appellants.

Baboo *Anukul Chandra Mookerjee* for the Government.

Baboo *Gopinath Banerjee* for the ghatwal.

Mr. Money for the appellants contended that, even if the Government was entitled to a declaration of its right to appoint a ghatwal, such right was not one for which the Court could give a declaratory decree under s. 15 of the Civil Procedure Code—*Casee Muzhur Hossain v. Dinobunde Sen* (a), *Baboo Motee Lal v. Rames* (b) *Brojo Kishore Dasee v. Sreenath Bose* (c). No declaratory decree can be given unless the plaintiff would be entitled to consequential relief if he asked it—*Nabokishore Dey v. Ramkishon Mohurir* (d) and *Brinda Dabee Chowdhrair v. Pearce Lall Chowdhry* (e). Here the Government could get no consequential relief.

(3) 2 Mad. H.C., 333.

(4) 1 I. J., N. S., 293.

* Regular Appeal, No. 104 of 1868, from the decree of the Principal Sudder Ameen of Manbhoom, dated the 17th March 1868.

(e) Bourke, 8. (b) 8 W. R., 64. (c) 9 W. R., 463. (d) *Ib.*, 131. (e) *Ib.*, 460.

Mr. Bonnerjee, contra.—The plaint discloses a sufficient cause of action. The maintenance of the widow is a charge, not mere-

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Baboo Anukul Chandra Mookerjee, on behalf of the Government, contended that, as to the form of action, the suit was for a declaration of right to re-instate a ghatwal for the time being in possession of his tenure, by setting aside a patni tenure created by the zemindar. Whether the appointment be in the hands of the Government or of the zemindar, Government has an interest in the appointment and is the best, or rather only Judge of its necessity; and in the present case the Government says that a ghatwal is necessary. The suit is virtually for a declaration that the village is a ghatwal village, and not the *mal* land of the defendant. The zemindar cannot oust a ghatwal—*Baboo Koolodeep Narain Singh v. Mahadeo Singh (a)*. Such ouster is an invasion of the rights of Government, and a period of sixty years is necessary to bar those rights.

Mr. Money was not called upon to reply.

MARKBY, J.—The history of this litigation is somewhat remarkable. In the year 1830, the zemindar of Pergunna Chutna, in Zilla Manbhoom, granted a patni lease or Mouza Karunjarah and other villages to certain persons of the name of Banerjee. When those persons went to take possession, they were opposed by one Srimant Roy, who claimed to hold the lands by hereditary right as ghatwal, paying a small fixed quit-rent to the zemindar. Thereupon the patnidar instituted a suit for the purpose of recovering possession. The right of Srimant Roy appears to have been then fully enquired into, and it was decided in 1834 that he was not entitled to hold these lands upon the tenure claimed. The patnidar thereupon took possession and nothing further was done during the lifetime of Srimant Roy, but after his

death, namely, in the year 1850, Kali Charan Roy, a defendant in this suit, and who claims to be his heir, made some attempt to get possession of these lands. The patnidars thereupon obtained an order from the Criminal Court, which directed that they should remain in possession. Kali Charan Roy then applied to the Civil Court for leave to bring a suit *in forma pauperis* against the patnidars and the Government jointly, in order to establish his claim to the possession of these lands as ghatwal. The application was heard by Mr. Oakes, the Assistant to the Agent of the Governor-General in Manbhoom, and, after enquiry, he held that, under s. 1 of Act IX of 1839, there was no ground for instituting the suit, and refused the application. Nothing further was done until the year 1866, when the Government brought a suit valued at Rs. 8,500, against the patnidars, certain durpatnidars, the zemindar, and the ghatwal for khas possession of Korunjarah, alleging that the whole village was Government ghatwali property, and that it was held by ghatwals in ghatwali down to the year 1834, in the course of which year the zemindar and patnidar dispossessed the ghatwal, under color of a decree secured in the civil suit collusively brought by them. The Principal Sudder Ameen gave Government a decree, but it was so palpably apparent that the lands claimed were included in the zemindar's settlement, that the Government did not, when the case came up on appeal before this Court, attempt to support the claim for khas possession; but the Government Pleader asked to be allowed to amend the claim and have the right of Government declared, which was refused.

The Government has now brought the present suit against the zemindar, the patnidars, and Khitu Roy, who is de-

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ly personal against the heir, but on the estate in his hands. In
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scribed in the plaint as ghatwal of Mouza Korunjorah, in Chutna. The suit is valued at Rs. 13,000, or twice the former amount, and in a plaint verified by the Assistant Commissioner, the Government claims the "right to re-instate a ghatwal in the possession of Mouza Korunjorah, in Pergunna Chutna, as a ghatwal tenure liable to be appropriated to the use of the ghatwal for the time being, by setting aside a patni talook collusively created by the defendants in the said village." The Principal Sudder Ameen has given the Government a decree in the terms of the prayer.

Upon appeal, the defendants object that this suit will not lie. They contend that the law does not recognize either in Government or a private person any such right as to re-instate another in possession; and that if any person is entitled to possession, he must ask it at the hands of the Civil Court. Further, they contend that the Government cannot ask to set aside the patni talook, for the lands being admitted to be within the zemindari and paying rent to the zemindar, the latter was entitled to grant a patni lease, including these lands, which would at any rate give the patnidar a right to receive the rent which is payable. And, lastly, that if any declaratory decree is asked for without relief, it cannot be granted; first, because the Government have nowhere stated the nature of the right they seek to have declared; and, secondly, because there has been no infringement or threatened infringement of any right of the Government, whatever it may be, on the part of any of the defendants, and that no relief, if asked for, could be given.

Having heard the very able argument of Baboo Anukul Chandra Mockherjee, who appeared for the Government, I am clearly of opinion that these objections must prevail.

Before considering the objections, I would point out that not the slightest attempt has been made by the Government in this suit—nor, as far as I can gather, was it made in the former suit—to support the charge of collusion which has been brought by the Government against the defendants. Why that charge has been brought, I am at a loss to conceive, but it is right to say that not a shadow of evidence has been adduced in support of it.

With regard to setting aside the patni talook, it seems to me quite clear that the Government can in no case ask for that relief. Even if the Government have any right which curtails the rights of the zemindar or patnidar over the lands of this village, it has none which enables them to have this patni lease set aside. It is not denied that the lands are within the zemindari, and it is admitted that the zemindar has a right to receive at least an annual fixed rent from the tenant of this village.

The zemindar, therefore, has a clear right to include in a patni lease the lands of this village. The existence of this patni lease does not in any way affect the rights of Government, if any there be; it only gives to the patnidar the rights of the zemindar. This part of the suit must therefore, fail.

With regard to the prayer for a declaration of the right of Government to re-instate a ghatwal in possession of these lands, it seems to me to require no argument to show that it is impossible that any such right can exist in any person or body whatsoever. We have, however, endeavoured to ascertain from the Government Pleader what the rights claimed by Government really are, in order to see whether or no we can adjudicate upon them in this appeal. As far as I could gather, it is not, as had all along on very good ground been supposed, sought to have Khitu Roy

the widow was held to have a right to maintenance as against the Government out of property forfeited to Government. In

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the person who is described in the plaint as ghatwal, re-instated in the possession of this village, or to have him declared ghatwal, or bound to perform ghatwali services, for it is now said that Government does not recognise him as ghatwal; but it is asked that we should declare that the Village Korunjorah is a village, the proceeds of which ought to be appropriated to the maintenance of a ghatwal, and also for a declaration that the Government is entitled to appoint a ghatwal. Now, putting aside the question of how far this is a departure (and it is certainly a very wide one) from the claim as originally made in the plaint, and assuming that we should permit the Government so to shift its ground in the Court, in Appeal, I am still of opinion that, in accordance with the rules laid down as to the cases in which this Court will grant mere declaratory decrees without relief, this cannot be maintained. The only actual disturbance of the right of Government took place 35 years ago, when Srimant Roy, the person who then claimed to be ghatwal, was ejected. It seems to me that, if the Government have any rights of which this act was an infringement, it might have come to this Court, and by a proceeding analogous to an information in the Court of Exchequer in England, might have asserted those rights whether against the zemindar, the patnidar, or its own ghatwal. It did not do so; and more than 15 years ago that ghatwal died, whereby, as the Government now say, the office became vacant. No new ghatwal has been appointed, and I am, therefore, at a loss to see on what possible ground the Government can come into Court for the declaration of a right, which for 15 years it has not thought proper to exercise, which it may never exercise, and which, if it does exercise, may not be

opposed. It is argued that it is useless for the Government to appoint a ghatwal, because it is clear that the zemindar and patnidar will not permit him to take possession of these lands; they having asserted all along that the lands are *mdl* and subject to no ghatwali rights whatsoever. Undoubtedly, they or their predecessors did so assert in 1832, and the Civil Court, after full enquiry, decided that they were right. All that the zemindar and patnidar have since done is to abide by that decision. I cannot conceive that their doing so in any way alters the position of the parties or gives the Government a right to maintain the suit. With that decision in their favor and seeing that the Government had allowed the office to remain in abeyance for a great number of years, I must say that it seems to me that the zemindar and patnidar would be justified in supposing that all claim on the part of Government was abandoned, and I cannot consider the exercise of their ordinary rights as zemindar and patnidar, respectively, to be such a denial of the rights of Government as would entitle the latter to come into Court and obtain a decree, without showing that any right had actually been infringed.

In such stronger cases this Court has declared that no declaratory decree ought to be made; as, for instance, where a Hindu widow has alienated her husband's property, and the presumptive heir sues in her lifetime to declare his presumptive right as next taker. So also where the widow sues to have it declared that she has a right of adoption which is denied, and which she has not yet exercised. So also in England in the case of *Bristol v. Witmore* (a) upon the words of the 15 & 16 Vic., c. 86, s. 50, which are the same as those of s. 15 of the Code of Civil Procedure here. When two parties were

(a) 28 L. J., Ch., 807 : 1 Johnston, 96.

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Ramchandra Dikshit v. Savitribai (1), her right to maintenance is stated to be a charge on the whole estate and on every part of it. That case was distinguished in *Srimati Bhagabati Dasi v. Kanailal Mitter* (2) on the ground that it was not law in Bengal; but there is no difference in the different Hindu schools on the subject of the widow's right to maintenance: they all admit the same moral obligations which are the foundation of the right to maintenance. The assertion of the right by a Hindu widow would probably be known only to the members of her family owing to the secluded life she leads. It is not necessary that an alienee should have notice of the widow's assertion of her claim to maintenance to make him liable for it—*Mussamat Golab Koonwar v. The Collector of Bentares* (3). In this case, however, the plaintiff can show, if necessary, that notice was in fact given to the defendant Chandra Mohan of the plaintiff's assertion of her claim. As to the claim for the daughter's marriage expenses, it is submitted that the estate also is liable for that; and if expense has been incurred by the widow, she is entitled to be repaid such expense out of the estate. It is submitted, therefore, that the plaintiff is entitled to a declaration that the mortgagee took the property subject to the rights of the plaintiff.

MARKBY J., shortly delivered judgment dismissing the suit, basing his decision on that of Phear, J., in *Srimati Bhagabati Dasi v. Kanailal Mitter* (2).

pressing rival claims upon the Commissioners of the Admiralty, and one party brought a suit against the other for a declaration of his rights, the Court of Chancery refused to interfere, on the ground that that Court could not make a bare declaration of right, although the defendants had asserted a right which they could not maintain in point of law. Wood, V. C., who decided that case, going so far as to say that in such a case the Court had no jurisdiction.

This last case is a very strong one, because the learned Vice-Chancellor was clearly most desirous, if possible to get

over the difficulty, but he thought it insuperable. These cases seem to me to go much further than it is necessary for us to go in the decision of this case, and I think it is clear that whatever the rights of the Government may be, the law does not authorize us to make any decree in its favour in the present suit and that the suit must be dismissed with costs in this Court and in the Court below.

L. S. JACKSON J.—I entirely concur in dismissing the suit, and generally in the reasons stated by Mr. Justice Markby

(1) 4 Bom. H. C., A. A. C., 73. (2) 8 B. L. R., 225. (3) 4 Moore's I. A., 246.

Mr. Bonnerjee observed that, though there was no allegation in the plaint to the effect that notice of the assertion of the widow's claim was given, he had mentioned in the course of his argument that the plaintiff was prepared to prove that she had given the mortgagee such notice, an issue might therefore be raised on the point, as issues must be framed, not merely from the written pleadings, but also from the oral statements of pleaders—*Mussamat Kousullya Dossee v. Ram Juggernath Dey Sircar* (1).

On a subsequent day, the case having been adjourned, further discussion took place as to the power of the Court to raise the issue whether the defendant Chandra Mohan took the property, with notice of the assertion of the plaintiff's claim to maintenance, and the cases of *Arbuthnot v. Betts* (2) and *Eshan Chunder Singh v. Shama Churn Bhutto* (3) were cited for and against that power.

Judgment was delivered as follows by

MARKBY, J. (who after shortly stating the plaint and issues continued)—I did not consider that there was any ground shown in the plaint for such relief, and, further, it appeared to me that, if the property were declared subject to the plaintiff's claim for maintenance and marriage expenses, she would obtain thereby all the security she would require.

The defendant Chandra Mohan, before proposing any issues and raising his other objections, objected generally to the form of the suit, first, on the ground that a Hindu widow had no such rights as were claimed in this suit; secondly, on the ground that the plaint only asked for a declaration of right, and not for any relief; and upon these two points after hearing Counsel on both sides, I was asked to express my opinion.

With regard to the first point, I considered that, without expressing any final opinion of my own, and reserving to myself the power of reconsidering the matter in the Court of Appeal,

(1) 8 W. R., 162.
(2) 6 B. L. R., 273.

(3) 11 Moore's I. A., 7.

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I ought, for the purpose of this suit, to follow the ruling of Phear, J., in the case of *Srimati Bhagabati Dasi v. Kanailal Mitter* (1) decided on the 8th instant. The learned Judge (according to a report of his judgment in the *Englishman* newspaper, which has on this argument been treated as correct) said that he was not prepared to say that the mere fact of the existence of the widow was sufficient notice to give her a lien against the estate in the hands of alienees; that against an heir who has taken the property the widow has a right to have her maintenance treated as a charge on the property; that she may doubtless follow the property in the hands of any one who takes it with notice of her having set up a claim for maintenance against the heir, but that in Bengal, she has not a lien on the property in respect of her maintenance against all the world, irrespective of her notice. I took the ruling of the learned Judge there to be that, in order to establish a lien against property in the hands of an alienee, the widow must show, not only that the alienee had notice of her existence, and therefore notice of the existence of a person who might claim maintenance, but notice that she had actually set up that claim against the heir. I do not understand that any such notice as that was alleged to have taken place in this case, but all that was alleged here as regards the maintenance, was that the mortgagee was aware of the widow's existence, and it was sought to be inferred from that that he was aware of her claim to maintenance, and the third issue was apparently framed with the intention of proving and relying on these facts; and I thought that, according to the ruling of the learned Judge upon which I base my decision, was not sufficient.

I also thought that, without going into the question now (upon which no authority had been cited before me, and upon which I express no opinion) as to whether or not the claim for the expenses of a daughter's marriage is precisely the same in character and extent as the claim for maintenance, it was quite clear that that part of the claim which relates to those expenses stands in the same position: because if it is necessary that notice that

(1) 8 B. L. R., 225.

a claim has been set up as against the heir should be given in the case of maintenance, it seems to me by parity of reasoning that it must also be given in the case of expenses for the daughter's marriage.

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The case was then adjourned until the following morning, in order that the parties might consider the effect of this ruling on the case as it stood. On the case being again called on, permission was asked on the part of the plaintiff to alter the frame of her 3rd issue by substituting an issue in this form:—Whether the defendant Chandra Mohan Sur took the property with notice that the plaintiff had asserted her right to maintenance out of the mortgaged property against the heir? And she also wished to make a similar alteration in the 4th issue. It was stated that the plaintiff was prepared to prove that the defendant Chandra Mohan had had express notice of the plaintiff's assertion of her right to maintenance and marriage expenses. This alteration in the issues was opposed by the defendant Chandra Mohan as not being in accordance with the allegation in the plaint, and his Counsel relied on the case of *Eshan Chunder Singh v. Sham Churn Bhutto* (1). But I thought that case had really nothing whatever to do with the question, and decided to alter the issues.

It remained, however, to decide the other objection, namely that the suit was only for a declaration of right, and did not ask for any relief; and, upon consideration, I think that that objection is fatal to the suit in its present form. I am inclined to think that the rule which excludes suits for a mere declaration of right is not quite so strict here as in England, and that by the practice of the Courts, at any rate in the Mofussil, suits are admitted in certain exceptional cases for a declaration of right, although no actual relief has been asked for, or could be granted; probably, because in these particular cases, there is manifest convenience in having the right ascertained, and there is no other way of raising the question: but I think there is nothing in the practice of this Court which would justify this suit in its present form. On the contrary, I think, it is the

(1) 11 Moore's I. A., 7.

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practice here, whenever a widow sues to have her right of maintenance declared, for her to ask, not that her right should be declared, generally, but that it should be enquired what is a fitting and proper sum for her maintenance, and upon what portion of her deceased husband's property and in what mode it should be secured. Whether or no, such a suit must be preceded by a demand by a mother, and refusal by the son to maintain his mother, I need not now say: but I may observe that there is no allegation in this case that the son is not maintaining his mother, or even that any funds applicable to that purpose have been directed by him to any other purpose. It is not said that she has been turned out of the family dwelling-house, or that there is any prospect of her being ejected. She asks for general lien to be declared over the whole property for her maintenance, without fixing the amount, and that the money expended on her daughter's marriages should be declared a charge on the property, without any inquiry whether those sums were properly expended; and the issues raised are in accordance with this indefinite prayer. In this form I think the suit cannot be maintained; and as no proposal is made for amending the form of the suit or the issues in this respect, the suit must be dismissed as against both defendants with costs on scale No. 2.

Pending the appeal, Mr. *Branson*, on behalf of the defendant Chandra Mohan, applied that the plaintiff should be ordered to give security for the costs of the appeal under s. 342 of Act VIII of 1859; he referred to the case of *Bamasundari Dasi v. Ramnarayan Mitter* (1).

Mr. *Lowe*, *contra*.—If the application is granted, the effect will be to prevent the proper rights of the plaintiff from being asserted. In the lower Court no issue as to her rights was allowed to be raised. The case was dismissed on preliminary points: the plaintiff has had no opportunity of going into her case and showing she is entitled to the relief asked for. [PHEAR, J.—You do not in your complaint ask for any specific

sum for maintenance, or that it should be paid out of any particular fund; that is the reason Markby, J., gives for dismissing it. It may be your appeal is merely a vexatious proceeding. *Mr. Branson*.—Opportunity was given to the plaintiff in the Court below to amend her pleadings, but she elected to stand by them as they were.] She asked in her prayer that an account might be taken for the purpose of ascertaining the proper amount of maintenance. The prayer is specific enough to enable us to obtain a decree, and then the amount can be ascertained. In applications of this kind, diligence should be used; there has here been great delay on the part of the defendants.

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Mr. Branson in reply.—Opportunity was given to the plaintiff in the Court below to amend her case, but she refused to do so. It is said the plaintiff prayed for a specific declaration, but the second ground of appeal is that the learned Judge “erred in holding that the plaintiff’s suit would not lie unless the plaintiff asked for a specific sum to be ascertained as necessary for the maintenance of the plaintiff, and further sought to charge such sum upon a specific portion of the property mentioned in the plaint.”

[*Mr. Lowe* objected to reference to the grounds of appeal, but the objection was overruled.]

Cur. adv. vult.

PHEAR, J.—On consideration of Markby, J.’s judgment, I find that he dismissed the suit mainly on the ground that the plaintiff only asked for a vague general declaration of right to maintenance, without further asking that the proper sum for maintenance should be ascertained, and made specific in amount. The last words of his judgment are “she” (the plaintiff) “asks for a general lien to be declared over the whole property for her maintenance, without fixing the amount, and that the money expended on her daughter’s marriages should be declared a charge on the property, without any enquiry whether those sums were properly expended; and the issues

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raised are in accordance with this indefinite prayer. In this form I think the suit cannot be maintained; and as no proposal is made for amending the form of the suit or the issues in this respect, the suit must be dismissed with costs." Markby, J., therefore, was of opinion, not only that the claim of the plaintiff was at the outset to have a general right of this kind declared, but also that the parties themselves declined to enable him to make a decree, which should be specific in its character, and on this ground he refused to give the plaintiff the relief which she asked. Now whether Markby, J., was right or wrong, as a matter of strict law or procedure, in refusing to make the general declaration of right to maintenance, for which he considered the plaintiff asked, still if I thought the plaint could not be construed otherwise than in the way in which Markby, J., construed it, namely, that it asked for nothing more than a general declaration, I should consider the litigation set on foot by the plaintiff as in a sense vexatious; because it seems to me that, even if she got the general declaration, she could make no use of it, without suing the defendants again *de novo*. Then, attributing this character to the suit, and coupling it with the apparent want of means of the plaintiff, I should think it was a case in which I ought to direct security for the costs of further litigation to be given. But I am not sure that the plaint must necessarily be construed quite so narrowly as Markby, J., did construe it. I express no opinion upon this point; but if the plaintiff has any ground to ask the Appeal Court, on the footing of her plaint, to make a decree for a specific amount of maintenance, and to charge it on the poverty, which is the subject of the suit, I think that her poverty alone ought not to lead me to grant the present application. It does seem to me on the whole that the plaintiff may be fairly justified in asking the Appeal Court to put the latter construction on the plaint. Consequently, as Mr. Branson has not given me any other ground than that of poverty in support of his application for security for the costs of the appeal, I think I must dismiss it. The costs of the application will be costs in the appeal proceedings.

On the appeal coming on to be heard, Mr. *Lowe* and Mr. *Bon-
nerjes* appeared for the appellants.

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Mr. *Marindin* and Mr. *Branson* appeared for the respondents.

Mr. *Lowe*.—More is asked for in this case than a mere declaration of right: the plaint asks that a right of maintenance may be declared, and that the amount may be ascertained: that is in accordance with the usual practice in cases of this kind, which is first to get a declaration of the right, and then to make an enquiry as to the value of the property and position of the parties, with a view to ascertain the amount. The plaint asks that an account may be taken. [MACHERSON, J.—The plaint asks for an account “for the purposes aforesaid” i.e., for the purpose of the declaration of the right, not of ascertaining the amount.] A suit is not to be dismissed, merely because it only asks for a declaratory decree; see s. 15, Act VIII of 1859—*Kenaram Chuckerbutty v. Dinonath Panda* (1). The widow has a right to maintenance as long as she continues to live in the family dwelling-house. The maintenance of unmarried daughters was a charge on the estate in the hands of the heir, *Makhanlal, Shama Charan’s Vyavashta Darpana*, 368—370. That the property is small, is all the greater reason for assigning the widow some maintenance, and *Mangala Debi v. Dinanath Bose* (2) decides that she cannot be ejected from the family dwelling-house as the defendant threatens to do. The case of *Ram Chandra Dikshit v. Savitribai* (3) decides that the maintenance of a Hindu widow is a charge on the whole estate and on every part of it. [COUCH, C.J.—The question there was as to whether one brother could be sued alone, and it was held that he could.] We ask for an injunction, which is more than a mere declaration of right: if we are entitled to an injunction against *Makhanlal*, that is, more than a declaration of right—*Gobindmani Dasi v. Shamlal Bysak* (4).

The Court called on the respondents.

(1) 9 W. R., 325.

(2) 4 B. L. R., O. C., 72.

(3) 4 Bom. H. C., A. C., 73.

(4) B. L. R., Supp. Vol., 48.

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Mr. Marindin.—It is in the discretion of the Court to give a declaratory decree or not. It would be vexatious and harassing if a plaintiff could come in and ask for an indefinite sum to be charged on the property. There is no prayer that the amount of maintenance should be ascertained, nor is it stated what would be a proper amount, nor on what part of the estate it is to be charged. [COUCH, C.J.—Ought this suit to be dismissed because the issue was not raised, whether the property in the hands of the mortgagee is chargeable with maintenance, and what is a proper sum? I think we have, if necessary, power to raise the issue now.] If the plaintiff asks for it, I do not think I can oppose it being raised, but the costs of the appeal ought in that case to be paid by the plaintiff—*The Government v. Rajah Raj Kishen Singh* (1). As to the claim for the daughter's marriage expenses, that is the right of the daughters, and they ought to have sued.

Mr. Branson on the same side.—Opportunity was given in the Court below to raise the issue, but advantage was not taken of it by the plaintiffs.

Mr. Lowe in reply.—As to raising issues, see *Arbuthnot v. Betts* (2). [COUCH, C.J.—That must be understood as applying to special appeals, not to regular appeals.] As to marriage expenses being a charge, see *Vyavashta Darpana*, 342 & 358.

COUCH, C.J.—This is an appeal from a decree of Markby, J., dismissing the suit with costs. The ground of the dismissal is stated by the learned Judge to be that the suit was only for a declaration of right, and did not ask for any relief, and that it is the practice of the Court, whenever a widow sues to have her right of maintenance declared for her to ask, not that her right should be declared generally, but that it should be inquired what is a fit and proper sum for her maintenance. We agree that this is a proper practice, and that it would be unjust that a burden of an indefinite amount should be imposed upon

(1) 9 W. R., 427; see p. 436.

(2) 6 B. L. R., 273.

the property which the defendant Chandra Mohan Sur holds as mortgagee by a general declaration of the plaintiff's right to maintenance, rendering it necessary for him to institute a suit to have the amount determined. The plaint prayed "that the plaintiff's rights over the estate of her late husband by way of maintenance, and for the expenses attended upon the marriages of her said daughters, as well those already incurred as those which may hereafter be incurred in respect of the marriage of her still unmarried daughter, may be ascertained and declared; and that it may be declared that the defendant Chandra Mohan Sur took his said mortgage subject to the plaintiff's right to maintenance, and right to be recouped the expenses necessarily and properly incurred by her in and about the marriage of her said two daughters, as also the right to be provided with the expenses necessary for the due and fitting performance of her said unmarried daughter's marriage, when incurred, or to some one or other of such rights, and that for the purposes aforesaid, all proper accounts may be taken and directions given." The plaint also prayed "that the defendant Makhnallal Dutt may be restrained by and under the order and injunction of this Honorable Court from alienation, dealing with, or disposing of the said one-third share of and in the said family dwelling-house, No. 2, Beadon Street, until the further order of this Honorable Court. and that the plaintiff may have such further or other relief as the nature of this case may require."

Now the rule in Courts of Equity is that, if the plaintiff should mistake the relief to which he is entitled in his special prayer, the Court may yet afford him the relief to which he has a right under the prayer for general relief, provided it is such relief as is agreeable to the case made by the bill. This rule should be acted upon in this Court, and is in accordance with the judgments of the Judicial Committee of the Privy Council in *Eshan Chunder Sing v. Shama Ohurn Bhutto* (1) and *Mohammed Zahoor Ali Khan v. Mussamat Thakooranee Rutta Koer* (2). Although, as the learned Judge says, no proposal was made for amending the form of the suit, we think he might,

(1) 11 Moore's I. A., 7.

(2) *Ib.* 468.

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upon the plaint as it then was, have framed issues for the purpose of determining what should be allowed for the maintenance and expenses, if the plaintiff should be found to be entitled to them, and that this should have been done instead of the suit being dismissed. No leave being reserved to bring a fresh suit, the effect of the dismissal is to bar the right of the plaintiff, which is too great a penalty for a mistake in the form of the suit. We think the suit should be remanded for re-trial, fresh issues being framed in accordance with this judgment; and that the parties should bear their own costs of this appeal.

Case remanded.

Attorney for the plaintiff: Mr. Hart.

Attorneys for the defendant, Chandra Mohan Sur: Messrs. Ghose and Bose.

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June 5 & 6

Before Sir Richard Couch, Kt, Chief Justice, and Mr. Justice Markby.
IN THE GOODS OF RAM CHANDRA DAS, DECEASED.

Court Fees' Act (VIII of 1870), Sched. I, cl. 11—Letters of Administration, Fee payable for—Debts due by Deceased—Letters limited to collect Rents.

The fee payable for letters of administration, under Act VII of 1870, Sched. I, cl. 11, is to be calculated on the amount or value of the property in respect of which the letters are sought, without deducting therefrom the debts due by the deceased.

Where letters are granted limited for the purpose of collecting the rent of a house, the duty is to be assessed on the value of the house.

CASE referred by Mr. Belchambers, the Taxing Officer, to the final decision of the Chief Justice of the High Court under s. 5 of the Court Fees' Act, 1870:—

“In this case the deceased died intestate, leaving a widow, and two adult and three minor sons, and three adult married and two minor unmarried daughters, and leaving—

(1). A house, No. 71, Bentinck Street in Calcutta, the monthly rent of which is Rs. 260, and which is valued at Rs. 20,000.

(2). A house, No. 23, Babooram Seal's lane in Calcutta, which is occupied as the family dwelling-house, but which is ~~dowry~~ property, having been dedicated by the grandfather of the deceased to the family idol.

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(3). A garden-house at Surah in the 24-Pergunnas, valued at Rs. 8,000, and which stands mortgaged for R. 7,000 and interest.

(4). Outstandings and stock-in-trade valued at Rs. 16,000.

On the other hand there are, it is alleged, debts (other than the mortgage-debt) due by the estate, amounting to Rs. 15,000.

The widow, with the consent of her adult sons, has obtained letters of administration of the property of the deceased, limited for the purpose of collecting the rent of the house, No. 71, Bentinck Street, and the outstandings due to the estate, and also limited for the purpose of selling the garden-house at Surah, and paying off the mortgage-debt.

In fixing the amount of the *ad valorem* fee chargeable under cl. 11, Sched. I of the Court Fees' Act, I propose to exclude the house in Babooram Seal's Lane (1), and to deduct the amount due on the mortgage of the garden-house at Surah from the value of the house.

The following questions have been submitted on behalf of the widow:—

1st.—Whether allowance should not be made for the debts due by the estate?

2nd.—Whether the *ad valorem* fee should be charged on the value of the house in Bentinck Street, or on the rent thereof?

As to the first question it has been decided that allowance should be made for a mortgage-debt—*In the goods of Peter*

(1) See Financial Resolution No. 2004, dated 14th July 1871.—“In the exercise of the power vested in him by s. 35 of the Court Fees' Act 1870, the Governor-General is pleased to remit in the whole of British India the fees chargeable under Sched. I, art. 11 of the said Act in respect of probate of wills or letters of administration in so far as

such wills or letters of administration relate to property which a deceased person was possessed of or entitled to not beneficially but as a trustee for any other person. Provided that this remission shall not extend to cases in which a trustee has the power of appointing or otherwise conferring a beneficial interest in the said property.”

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Innes, deceased (1); but that decision does not apply to any other kind of debt. In England debts due by an estate are included in the amount on which probate duty is charged, but a refund may be afterwards obtained in respect of debts which have been actually paid on proof of payment thereof. This is specially provided for by s. 51 of 55 Geo. III, c. 184; but there is no similar provision in the Court Fees' Act.

The second question depends upon whether the house in Bentinck Street, or the rent thereof (to the collection of which the letters of administration are limited), is to be considered as forming, within the meaning of the words in Sched. I, "the property in respect of which the probate or letters of certificate shall be granted." These words, it appears to me, refer to property *in esse* at the time of the grant of probate or letters of administration, and not to income to be derived from property *in futuro*. In this view the question would resolve itself into this, whether or not the letters of administration granted in the present case are, in the form in which they have been granted, in respect of the house itself? If not in respect of the house itself then no fee either on the value or the rent of the house would be chargeable under the provisions of the Court Fees' Act. If it should however be considered that the rent, and not the value of the house, is liable to the *ad valorem* fee, it will be necessary to determine upon what amount of rent it should be charged. The amount of rent may fluctuate, and the house may not always be tenanted. In addition to this the letters of administration, though limited as to the power conferred thereby, are unlimited as regards the period of duration. It is, therefore, impossible to say how long the rent may be received thereunder. Contingencies, as the death of the administratrix, or the partition of the property, &c., may at any time put an end to the letters of administration. But on the supposition that none of these contingencies will arise, and that the minor sons will all live to attain their full age, it may be expected that the sons will, on the youngest of them attaining his full age, take possession of the house. Under the circumstances the proper course

probably would be to charge the *ad valorem* fee on the aggregate amount of rent calculated up to the day on which the youngest son will attain his full age."

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The *Advocate-General* (Offg.), on behalf of Government, submitted that, as to the Bentinck Street house, the fee was payable on the value of the house. The Court Fees' Act contains no provision for an allowance in respect of debts due by the estate. The words used are "the amount or value of the property," whereas in the English Act the words are "estate and effects." There is no authority for the proposition laid down in the case of—in the goods of *Peter Innes* (1). With regard to the premises in Babooram Seal's Lane, I need only refer to the remarks of Peel, C.J., in *Sib Chunder Doss v. Sib Kissen Bonnerjee* (2) as to their being a beneficial residue in the nature of a resulting trust for the endower and his heirs; but the letters being limited to the house in Bentinck Street, it will be unnecessary to enter upon this point.

Mr. *Phillips* for the widow contended that the debts ought to be deducted. The justice of such a deduction is recognized in England; the Indian Act, it is true, contains no express recognition; but s. 38 of the English Act 55 Geo. III, c. 184, provides that probates or letters of administration shall not be granted without an affidavit that the estate and effects of the deceased "without deducting anything on account of the debts due and owing from the deceased are under the value of a certain sum to be therein specified," which seems to show that the Legislature thought it necessary to expressly exclude deduction of debts in the affidavit upon which the assessment is based. Then in s. 40 provision is made for a refund in case of too high a stamp duty being paid. The words "amount or value" are ambiguous, but the more natural construction of "value" is the net value after deducting debts, and the case of *In the goods of Peter Innes* (1) supports this construction. (Couch, C.J.—The

(1) 8 B. L. R., App., 43.

(2) 1 Boul., 70.

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The administrator is bound to pay them out of the estate which comes to his hands. If the debts are not deducted, then, in the case of an insolvent estate, the only effect would be to diminish the fund available for creditors, which the Legislature can never have intended. As to the house, what the administratrix acquires by virtue of the letters is the right to receive the rents; she cannot deal with the house itself in any way. Such right can perhaps hardly be termed property, and, at any rate, as it is a right which may be put an end to at any moment by the person entitled taking out general letters of administration, it is a right, incapable of valuation, and therefore no duty is payable. On the limited administration the fee must be either on the whole property of the intestate, or on the portion which comes into the hands of the administrator, and out of which he can pay the fee. If it is to be calculated on the whole property, then he might have to pay more than the assets which will come to his hands, which is in violation of the principal that an administrator cannot be called upon to pay except out of assets; for instance, an administration for the purpose of making an assignment, or of carrying on proceedings in Chancery) see I Williams on Executors, 497, 498) would involve, on that principal, payment of duty on the whole estate, although no assets whatever might come to the administrator's hands.

The *Advocate-General* (Offg.) in reply.

Coch, C.J.—The first question which has been referred to us is whether, in estimating the amount of the *ad valorem* fee, any allowance is to be made for the debts due by the estate. Now the words in the schedule are:—"If the amount or value of the property in respect of which the probate or letters of certificate shall be granted exceeds one thousand rupees." The letters are granted in respect of the property of the deceased, although it may have to be applied to the payment of debts. It is not less the property of the deceased, because, instead of being given as legacies, it is to applied to paying debts. It is in order that the property may be collected by the administrator

and so applied that letters of administration are necessary. It is impossible to read the words as meaning the amount or value after deducting the debts due by the deceased. What has been done in England leads to the same conclusion. The words in the schedule of the English Act are not precisely the same as the words in this Act, but they are substantially the same, "estate or effects of the deceased," with the addition of the exception which has been introduced here by the Financial Resolution mentioned in the reference. It was considered necessary to make an express provision in the English Act for a return of duty in respect of a portion of the property which is applied towards the payment of debts. It may be thought to be a hardship that in this country that should not be allowed. It might be better that it should. The matter may have been in the contemplation of the Legislature in India when this Act was passed, and the Legislature may have thought it was not proper to allow a deduction on account of debts, or it may be that the matter was not thought of at all. We have nothing to do with that. We are not to make the law but to put a construction upon the language which the Legislature has used, and we think the fee must be paid in respect of the value of the property, without deducting the amount of the debts to be paid out of it.

The second question is, whether the *ad valorem* fee should be charged on the value of the house in Bentinck Street, or on the rent of it? Mr. Phillips was obliged to admit that the duty must be paid either on the value of the house, or on nothing at all. The parties may obtain letters of administration, and have the benefit of them for the purpose of receiving the rent for an indefinite number of years (for there is nothing to prevent that), and not pay any duty at all. That almost shows that such a view of the Act is wrong. The letters of administration are granted in respect of the house and of the property in it, but they are limited to the particular purpose of receiving the rent. The administrator is precluded from dealing with the property in any other way than simply to receive the rent; still the administration is in respect of the property. To say that the right to receive the rents is to be considered as property

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in respect of which there is to be administration is absurd. The right to receive the rent is incidental to the property in the house. We think the right way to assess the duty is to take the value of the house, and upon that the *ad valorem* fee ought to be paid.

Government Solicitor : Mr. *Chauntrell*.

Attorneys for the administratrix : Messrs. *Beeby and Rutler*.

[APPELLATE CRIMINAL.]

Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice L. S. Jackson, and Mr. Justice Macpherson.

QUEEN v. AMIR KHAN AND OTHERS (APPELLANTS),*

1871
Dec. 21.

Jurisdiction—Act XI of 1857—Act XVII of 1862, s. 4—Waging War against the Queen—Abetment—Penal Code (Act XLV of 1860), s. 121—Code of Criminal Procedure (Act XXV of 1861), s. 28—Warrant of Arrest under Reg. III of 1818—Effect and Weight of Evidence.

Where the prisoner was charged with having, at Calcutta, abetted the waging of war against the Queen, and was tried at the Sessions Court of Patna, it was held that the Court of Sessions at Patna had jurisdiction to try him, because he was a member of a conspiracy, other members of which had done acts within the district of Patna in pursuance of the original concerted plan, and with reference to the common object. The Court of Patna had jurisdiction also, because the prisoner had sent money from Calcutta to Patna by hand, and, until that money reached its destination, the sending continued on the part of the prisoner.

The Governor-General, in issuing a warrant of commitment under Regulation III of 1818, does not in any way act judicially or as a Court of Justice, nor is he to be considered as having adjudicated that the person, placed under personal restraint, had been guilty of some specific offence. The proceeding is not in the nature of a conviction of the person placed under restraint, therefore the person so placed under restraint cannot, in any future proceeding taken against him, plead that he has been already tried, convicted, and punished.

Letters, &c., found in a man's house after his arrest, are admissible in evidence, if their previous existence has been proved.

*Criminal Appeal, No. 522 of 1871, from the order of the Sessions Judge of Patna, dated the 26th July 1871.

Pir Mahomed, Amir Khan, Hashmadad Khan, Mobaruk Ali, Tobaruk Ali, Haji Din Mahomed, and Aminuddin, were, on the 27th March 1871, committed by the Officiating Magistrate of Patna to take their trial at a special sessions to be held on the 1st May 1871.

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The Officiating Magistrate drew up thirteen different charges against the prisoners with different heads or counts :—

The first was against Pir Mahomed : that he, in or about the years 1862, 1863, 1864, and 1865, and also in or about the years 1866, 1867, 1868, and 1869, at Dinapore, abetted the waging of war and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Indian Penal Code.

The second was against Amir Khan, Hashmadad Khan, and Mobaruk Ali : that they, in or about the year 1867, at Patna, abetted the waging of war and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The third was against Pir Mahomed and Mobaruk Ali : that they, in or about the year 1867, at Dinapore, abetted the waging of war and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The fourth against Amir Khan alone, under fourteen different heads, charged that he, in or after the month of May 1861, in or about the year 1862, in or about the year 1863, in or about the year 1864, in or about the year 1866, in or about the year 1869, at Calcutta, abetted the waging of war and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The fifth was against Hashmadad Khan : that he in or after the month of May 1861, in Calcutta, and in or about the years 1862, 1863, 1864, and 1867, at Patna, abetted the waging of war and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The sixth was against Mobaruk Ali : that he in or about the years 1863, 1864, 1865, 1866, 1867, and 1868, at Patna, and in or about the years 1864, 1866, and 1869, at Delhi, abetted the waging of war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The seventh was against Tobaruk Ali : that he, in or about the years 1864, 1865, 1866, 1867, and 1868, at Delhi, abetted the waging of

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war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The eighth was against Tobaruk Ali and Aminuddin : that they, in or about the years 1866 and 1867, at Delhi, abetted the waging of war, and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The ninth was against Aminuddin : that he, in or about the years 1862, 1863, 1864, 1865, 1866, 1867, and 1868, at Delhi, abetted the waging of war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The tenth was against Haji Din Mahomed : that he in or about the years 1862, 1863, 1864, 1865, 1866, 1867 and 1868, at Rawul Pindee, abetted the waging of war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The eleventh and twelfth were against Haji Din Mahomed and Pir Mahomed : that they, in or about the year 1866, at Dinapore, abetted the waging of war, and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code.

The thirteenth was against Tobaruk Ali : that he, in or about the year 1863, at Umballa, waged war, abetted the waging of war, and attempted to wage war against the Queen, and thereby committed offences punishable under s. 121 of the Penal Code; and that he at Mulka prepared to wage war, with the intention of either waging war or being prepared to wage war against the Queen, and thereby committed an offence punishable under s. 122 of the Penal Code.

The charge against Amir Khan was amended by the Sessions Judge at the trial. In the first two counts he was charged with having, during or about the month of September 1861, at Calcutta, abetted the waging of war, or attempted to wage war against the Queen, and thereby having committed an offence punishable under s. 1 of Act XI of 1857 (1), and within the cognizance of the Court of Session. In ten succeeding counts he was charged with having, during or about the month of May 1862, during or about the month of September or October 1863, during the months of January, February, March, or April 1864, on or about the 13th June 1866, and during or about the month of July 1869, at Calcutta, abetted the waging of war, or attempted to wage war against the Queen,

(1) See Act XVII of 1862, s. 1.

and having thereby committed offences punishable under s. 121 of the Penal Code, and within the cognizance of the Court of Session.

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Amir Khan had been arrested in Calcutta, on the 10th July 1869, under a warrant of the Governor-General in Council, issued under the provisions of Regulation III of 1818. He was kept in confinement at various places till the 20th of January 1871, when he was released, and again arrested under a warrant of the Officiating Magistrate of Patna, dated the 4th January 1871. Under that warrant he was removed to Patna, and there put upon his trial with the other prisoners, who had likewise been imprisoned under the provisions of Regulation III of 1818.

The prosecution attempted to make out the charge of conspiracy against Amir Khan by proving (among others) the following facts, by the evidence of accomplices :—That the North-West frontier of India has been in a state of warfare since the year 1827, when Syad Ahmed, at the head of a body of fanatics, fought with the Sikhs; that fighting has been going on down to the present day under various leaders, and has for many years past been directed against the British Government, between whose troops and the fanatics there have been several fights; that these fanatics receive support by voluntary contributions of money, and recruits come to them from several places in Bengal; that the money from Bengal is sent, by hundis or in cash, in the first instance to Patna, whence it is forwarded to the frontier; that at Patna the movements of the conspiracy were directed by Fyaz Ali, Yahiya Ali, and Harhat Hossein, who were said to be the chief agents of the malcontents; that Amir Khan was a disciple of the leading fanatic, and at one time entertained *jehadis* at his house in Patna; that Amir Khan was in the habit of living at his house in Patna with his family, except when he came to Calcutta on account of his business; that he attended a *musjid* at Patna, where *jehad* was regularly preached; that he directed his trading agent, Amir Khan of Pubna, to collect *zekat*, and that his agent did collect sums of money, and that he sent these moneys to Yahiya Ali, the head of the conspiracy at Patna,

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and Ahmadulla, of Saduttpore, who acknowledged the receipt of them ; that one Kazi Mian Jan, an inhabitant of Comarcolly, Zilla Pubna, was concerned in the conspiracy, and that he was one of the agents for the collection and transmission of money for *jehad* purposes ; that one Daimulla, a disciple of Kazi Mian Jan, paid Mian Jan *zekat* and *fitra* every year, and on one occasion took Rs. 200 (Rs. 125, his own money, and Rs. 75 given to him by Kazi Mian Jan) by Mian Jan's order, and made it over to Amir Khan of Pubna ; that Kazi Mian Jan's house was searched by Nabakrishna Ghose of the Bengal Police sometime in February 1864, and among the vast mass of correspondence found there, were three letters which purported to have come from Amir Khan, the prisoner, to Kazi Mian Jan, and, accordingly, Nabakrishna proceeded to Calcutta with Kazi Mian Jan and his brother Kazi Murad ; that he there met Major Parsons, District Superintendent of Police of Umballa, and these two, with others, proceeded to Amir Khan's place of business, and from what passed there, Amir Khan was arrested ; that these letters were explained to Amir Khan, and he was asked if he wrote them, and was called upon to show the entries in his books of the transactions mentioned in them ; that Amir Khan pointed to one of his munshis, Mosahib Ali, as having written the letters, and being able to show the accounts ; that Mosahib Ali admitted having written the letters, and said he wrote them by his master's orders, and pointed out the entries ; that a sum of Rs. 200 was received by Yahia Ali and Fyaz Ali, through Asad Ali, the son-in-law of Amir Khan, the receipt of which was announced to Kazi Mian Jan as purporting to be on account of the balance of the price of books, the same term as was used in the letter N1A from Amir Khan to Mian Jan. It was contended by the prosecution that this term signified money for the support of *jehad*, and that other fictitious names were used in the account books of Amir Khan. These letters were marked L1, M1A, and N1A, and were as follows :—

(Translation of Exhibit L1.)

MY DEAR SHEIKH SAHIB,—After compliments and wishes for a happy interview, which is the sole object of my heart, be it known to you that, thanks to God, I am all right up to the present time

through God's favor, and I pray to him every moment for your good health. Your kind note containing (your) happy news, and asking about the transmission of a hundi for Azimabad to Hatkhola, came to hand by post, and I learned the contents thereof. My friend, whatever sum of money you wish to send to Azimabad, you can lodge at the firm of Amir Khan Sahib in Nazarpore, Pubna, and in lieu thereof get a hundi drawn out in favor of (*ba nam*) Zarawar Khan, and send it in to Azimabad, or you can send it to me, and I will forward it from here to Zarawar Khan Sahib. If this cannot be done, get a hundi drawn out on the *mahajans* (or the banker) of Hatkhola, and send it to me. On receipt of the hundi I shall realize the amount and remit it to Zarawar Khan Sahib at Azimabad. Rest assured.

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Dated 8th Zikadi 1278 (8th May 1862), Thursday, from Calcutta.

(Translation of Exhibit M 1.)

(Envelope.)

God willing, this envelope having reached Comarcolly, should reach the Khan Shaib (who is kind to his friends) Kazi Abdulla Khan, *alias*, Mian Jan. May God increase his favor.

Comarcolly, dated the 3rd Zilhigga 1278 Hijra. (2nd June 1862.)

From Amir Khan, Calcutta.

Post marks—Calcutta, 2nd June 1862. Jessore, 3rd June 1862.

Comarcolly, 4th June 1862.

Bearing 1 anna.

(Translation of Exhibit M 1 A.)

MY DEAR KHAN SAHIB,—After compliments and wishes for a happy interview, which is the chief object of friends, I have to inform you that your letter, with two hundis for Rs. 125, written by Amir Khan of Pubna, on account of the sale of books, came to hand by post, and I was thereby highly obliged. My friend I have sent the said amount to Azimabad through (*marfat*) Zarawar Khan Sahib. Rest assured by all means.

I conclude with best wishes.

(Translation of Exhibit N1.)

(Envelope.)

God willing, this envelope having reached the Moonsiff's Court at Comarcolly, should reach my friend Kazi Abdul Rahman Sahib, &c., &c.

Comarcolly Moonsiff's Court.

From Amir Khan, Calcutta.

Dated the 8th Rubicool-owal 1278 Hijra (4th September, 1861)

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Bearing.

Post marks—Calcutta. Comarcolly, 17th September.

(Translation of Exhibit N 1 A.)

MY DEAR KAZI SAHIE, &C. &C.,—After compliments and wishes for a happy interview, which are more than I can speak and write, I have to state that, thanks to God, the news of this place is all right, and I always pray to him for your good health. Your kind letter containing (your) happy news, with a hundi for Rs. 200 on account of the sale of books for transmission to Azimabad, dated the 3rd Rubi-ool-owal, came to hand by post under a registered cover, and I fully learned the contents. May you be ever so kind and live well and in good health. As you have sent a hundi, I, have given credit for it in the Azimabad account. God willing I shall, as desired by you, write about the remittance to Azimabad. Rest assured by all means. Two days before I had the pleasure to receive from you a kind note, dated the 2nd Rubi-ool-owal. This I write for your information.

Dated the 8th Rubi-ool-owal 1268 Hijra (14th September 1861).

At the trial Mir Mahomed and Hashmadad Khan were acquitted and released. As to Amir Khan, the Sessions Judge, differing from three of the four assessors, found him guilty on the first head of the amended charge, and sentenced him to transportation for life and to forfeiture of all his property. The Judge, differing from three of the assessors, also found Amir Khan guilty on the third head of the amended charge (1); but the Court did not pass any separate sentence, as he had been already sentenced on the first head of the charge. The other prisoners, Mobaruk Ali, Tobaruk Ali, Haji Din Mahomed, and Amiruddin were also convicted, and sentenced to transportation for life, and forfeiture of all their property.

The prisoners appealed to the High Court. The appeal of Amir Khan was heard separately.

(1) The first and third heads of the amended charge were as follows:—

1st.—That he, during or about the month of Sept. 1861 A. D. at Calcutta, abetted the waging of war against the Queen, and that he has thereby committed an offence punishable under s. 1 of Act XI of 1857, and within the cognizance of

the Court of Sessions. 3rd.—That he, during or about the month of May 1862 A. D. at Calcutta, abetted the waging of war against the Queen, and that he has thereby committed an offence punishable under s. 121 of the Indian Penal Code, and within the cognizance of the Court of Sessions.

Mr. Anstey and Mr. Ingram for Amir Khan.

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The Advocate-General and the (offg.) Standing Counsel for the Crown.

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Mr. Anstey.—There is no direct evidence except that of accomplices uncorroborated. Confessions extorted are no evidence. This rule is not peculiar to English law. There is no difference in this respect between confessions out of Court and these made in Court.

The only overt act relied upon against Amir Khan was committed in Calcutta, if anywhere. This is a vital objection, not one of form. The trial took place at Patna, in consequence of an opinion expressed by two Judges of this Court Phear and Macpherson, JJ., that one of the acts took place out of Calcutta. Amir Khan was in Calcutta, but was seized and taken away to Patna. He was entitled to be tried by a jury and a Judge of this Court, and to be heard on all the charges under the law obtaining in Calcutta. Every act done at Patna could at best be an abetment of the original offence, viz., the waging of war. The charges of actual conspiracy were abandoned. What he has been convicted of, are acts done by him only, and not for acts of conspiracy.

The second objection may be expressed in the maxim *nemo debet bis puniri*. The Government had two courses open to them, the one under Regulation III of 1818, and the other an ordinary prosecution under the Penal Code. The Government elected the former. They thought fit for two years to proceed under this Regulation, and not under the Penal Code. During the whole of that time they kept Amir Khan in imprisonment. On appeal before Phear and Markby, JJ., from the order of Norman, J., refusing a writ of *habeas corpus* (1), Phear, J., said of the Governor-General's warrant;—"It is equally clear that the warrant is not a warrant of arrest. It is a warrant of commitment, reciting that which is by virtue of the Regulation equivalent to a conviction" (2). If it was equivalent to a conviction, the maxim *nemo debet bis puniri* applies.

(1) In the matter of Amir Khan, 6 B. L. R., 392.

(2) *I*, 468.

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The appellant was entitled to plead *autrefois convict*. It was in evidence before Mr. Prinsep that Amir Khan had been arrested, and had undergone his punishment for certain offences; that he had been discharged; and that he had been re-arrested upon charges relating to acts committed between the years 1861 and 1867. It is not pretended that he committed any offence between the arrest on the 10th July 1869, under the warrant of the Governor-General, and his being put in jeopardy before the Officiating Magistrate of Patna. The proceeding under Regulation III of 1818 is similar to a proceeding by a Bill of Pains and Penalties as in the case of *Bishop Atterbury* (1). The Acts of Parliament, 9 Geo. I., cc. 15, 16, and 17, were passed in consequence of the opinion stated in that case. The objection was taken on the part of the noble Lord that there would be injustice if Parliament gave judgment and passed a Bill of Pains and Penalties, and yet such judgment could not be pleaded as *autrefois convict* or *acquitted* in the ordinary Courts of Justice (2). Phear, J., correctly describes the warrant under which Amir Khan was arrested. In fact, the Government elected their own remedy. The prisoner is entitled to plead *autrefois convict*, and on his behalf I tender now the plea which was rejected by the Sessions Judge.

A third preliminary objection, which is a formal one, is that the Magistrate issued a warrant without any evidence before him. He had no jurisdiction even if the offence was committed out of Calcutta, for the depositions were not taken before the 5th of January 1871, whereas the warrant, which was issued upon them, was dated the 4th January, i. e., the day preceeding that on which the depositions were taken.

(1) 16 How. St. Tr., 823.

(2) At p. 515.—“It is a rule both in law and reason that *nemo bis puniri debet pro eodem delicto*, and yet that may happen to be the Bishop's case. For the charge in the bill is general; intending to raise a rebellion, and holding treasonable correspondence in order to bring in foreign forces; but there is no particular fact charged upon him. Now, if he should be indicted for either of those

species of treason, and particular overt acts of such treason should be alleged, as buying arms, and listing men for the Pretender, and the overt acts should be proved by two witnesses, he might be condemned and executed for it. For he could not plead this bill in bar to such indictment; because the indictment would not be for the same facts, there being no particular ones charged in the bill.”

The genuineness of the letters produced is denied. They were not marked when taken, as stated, at Amir Khan's house after his arrest by the detectives, who have taken the place of the former *goindas* (spies). Thus, a necessary link in the chain wholly fails. The trover of the letters did not take place, *ex concessis*, until after Amir Khan's arrest. The house was vacant at the time, and, what was worse, in the possession of the detectives. Letters so found ought not to be received in evidence. They were proved by the evidence of witnesses who had been under detention and restraint for months and years. One of the witnesses says:—"I was arrested at Hazara, and confined for ten months in the Abbotabad jail. I am not now under guard. I was when I gave evidence before the Magistrate, but after that the guard was removed." Before the Magistrate he said:—"I am still under *pahra* (guard). I am now living in a compound. I don't know whose compound it is. Mr. Reily lives in the house. There are constables always on *pahra* over us. There are four constables over us; they watch us. There are about 100 of us altogether." Yet Mr. Reily was not called to say whether the witnesses were in a state of terror or not. The prisoners were deprived of his cross-examination, and thus have been prejudiced in their trial.

The Magistrate ought to have tendered a pardon to the accomplices in open Court under s. 209 of the Criminal procedure Code: s. 203 says:—"Except as provided in s. 209, no influence, by means of any promise or threat or otherwise, shall be used to the accused person to induce him to disclose or withhold any matter within his knowledge."

In cases of treason and waging of war against the sovereign, no room for conjecture must be left; everything must be certain and clearly proved. In *Reg. v. Barnardiston* (1), it is said that no man shall be put in peril of his life on the forced construction of language or letters. In *Bishop Atterbury's Case* (2), Sir Constantine Phipps contended that innuendoes, which make criminal letters and documents not otherwise criminal, are not

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(1) 9 How. St. Tr., 1333.

(2) 16 How. St. Tr., 323.

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allowed. In *Reg. v. Crosby* (1), also referred to in *Bishop Atterbury's Case* (2), Holt, C. J. says:—"Were these papers ever so treasonable, they are addressed to none, though the French king be mentioned in them, and that the indictment supposes them to be contrived for to invite him over," although the evidence was not sufficient for such a supposition, and therefore no presumption could be supplied. The detectives imagined a cypher, but they could not discover a key, although they have been in possession of the books and letters for years. Milk may mean gunpowder, Mr. Prinsep, in accepting the key of the cypher, has done that which cannot be done. It has taken the prosecution eight years to get up the case from these letters and books taken in 1864. The witnesses who pretend to explain the correct meaning of certain words and expressions are men who have either been convicted of, or have confessed to, taking part in disloyal practices.

In the charges the dates were not specified as prescribed in the Code of Criminal Procedure.

Letters and books have been proved by oral evidence, without an effort to produce them. In one case the witness says:—"I tore up the letter I received immediately, and my answer I have not been able to see." Yet he is allowed to speak to the contents.

A witness (Mobaruk Ali) was allowed to say that *jehad* was preached out of a book, which was not produced, and no notice was served upon any one to produce it, and it is not shown that Amir Khan was present. The question, "what were the contents of the book?" though objected to, was allowed by the Judge to be put.

No plot is shown to exist. The only evidence is that of approvers. Besides these approvers, no other person is shown to have been party or privy to the alleged plot.

Suppose the evidence was not only admissible but untainted, it does not establish a connection between orthodox Sunnis and the Puritans or reformers, the Wahabis. Amir Khan has been to Mecca. *Zekat* and *jehad* are the two words used by the Magistrate and by the Judge. Amir Khan is shown

(1) 12 How. St. Tr., 1291.

(2) 16 How. St. Tr., 508.

to have been a charitable man. His accounts show it. If *zekat* is given at the same time that *jehad* is going on, it must be for the *jehad*. Such is the reasoning employed. In Mahomedan times all these gifts were collected in one place, which was called "*bytalmal*." (*Reads* who are the objects of charity from the Hedaya, Vol. I, p. 53.) *Zekat* had fallen into disuse; the great labor of the Arab, Abdul Wahab, 120 years ago, was to restore the *zekat*. In Bombay, in the case of *The Queen v. Agha Khan* (1), Arnold J., in 1866, held that the collection of *zekat*, although enjoined by the Mahomedan religion, gave no cause of action that a Court of Justice could enforce. He recognized the legality and the levy of *zekat* under spiritual compulsion. (*Reads* Sale's Koran, c. 2, p. 23; c. 22, pp. 277-278, as to the duty of taking up arms against unbelievers. See also c. 10, p. 174. Having said all this of idolators, he speaks of the Christians in a note to c. 6, p. 115.) What *jehad* is no one can tell. Its literal meaning is "endeavor." It may be an endeavor to effect a supremacy by a military force, if the interpretation wished to be put upon it by some is accepted. Suppose the term *jehad* is applicable to a military enterprise, it is equally applicable to the endeavor to extend the Mahomedan faith in the time of profoundest peace by means of the most peaceful methods. Amir Khan has suffered great hardship from the perverted views put forward, in the shape of articles and criticisms, on the subject of the duty of the Mahomedans to wage war against the ruling powers. The appellant has to cope with the prejudices thus raised against him. It is asserted that the preaching or waging of *jehad* must be either strife or Islam, and that *jehad* in either case is making war against the ruling powers. It is not so. There is a third class or condition of things under which the preaching of *jehad* means no such thing, and that is in a land of security. British India is not *dar-al-harb*. The Sikh country would be *dar-al-harb* when it was under the Sikhs, because the Mahomedan religion was kept under subjection by the violence and tyrannical rule of the governing powers. This is *dar-al-aman*, or

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 AMIR KHAN. the place of security. Abdulla Kowidi, a witness, says—"our *jehad* was against the Sikhs and *kafirs* (infidels)." When the Sikhs passed under the British rule, the British stepped in to protect the Sikhs, their new subjects, so the *jehadis* fought against the British ; but it is clear that they were not treated as rebels, but as prisoners of war.

Mr. Ingram on the same side.—In this case seven prisoners were tried at the same time, on thirteen different charges, for acts done by them separately in different parts of India, and supported by different evidence, no common object or design having been alleged or proved. The charges are dissimilar. Tobaruk Ali is charged with waging war against the Queen in a foreign country, and it is not proved that he is a British subject ; others with having abetted the waging of war at Patna ; others again, with having abetted it at Calcutta. It was impossible for any man to keep in memory the direct line of evidence against any one of the prisoners. Where evidence was adduced that would have been objected to as to one man, it was received because it was good evidence against another. We could have examined some of the prisoners as our witnesses ; but as they were all put upon their trial at the same time, we were deprived of the advantage of their evidence (1).

All the acts that made up the offence said to have been committed by Amir Khan, were committed at Calcutta. In the first charge, as to which a verdict of not guilty was entered, he was charged with abetting and attempting to wage war at Patna. The second charge consisted of seven different acts put in the different forms of abetting the waging of war and the attempting to wage war, and all were laid as having been committed at Calcutta. The rule of English law making conspiracies triable in any county where any overt act, in furtherance of the conspiracy, is proved to have been done therefore did not apply. If crime is local according to the rule of practice in English law, it is still more so in this country, where special provision is made for the trial of offences in the district in which the offence is committed, and under a code that is complete in itself. By s. 26

(1) See *The Queen v. Payne* L. R., 1 O. C. R., 349.

of the Criminal Procedure Code, it is provided that, "except where otherwise expressly provided by this Act, every offence shall be enquired into and determined in the district or division of a district in which the offence was committed;" and s. 27 provides that, "when a person shall be accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be enquired into or determined in any district or division of a district in which any such thing shall have been done, or any such consequence shall have ensued;" and s. 28 says:—"The abetment of an offence, wherever such abetment shall have taken place, may be enquired into or determined in any district, or division of a district, in which the offence abetted may be enquired into or determined by any Court which has jurisdiction to try such offence, as if the abetment had been committed at the same place at which the offence abetted was wholly or partly committed; or the abetment may be enquired into or determined in any district or division of a district within which the abettor has done anything for abetting the commission of such offence." As to the acts charged against him as having been done in 1863, 1864, 1866, and 1869, in furtherance of an alleged conspiracy, he was found not guilty by Mr. Prinsep. The substance of the charge against him now is that he sent Rs. 2000 and Rs. 125 by means of hundis to conspirators, with a knowledge of the purposes for which the money was wanted. The defence is that these hundis were an account of commercial transactions, and Amir Khan's books bear this out. The evidence begins with acts that occurred 34 years ago. The proceedings were opened by the reading of a notice. There was no opening speech or statement of facts which the prosecution intended to put forward and prove. We laboured under great disadvantage in not knowing what case we were called upon to meet, or within what period the charges were to be limited until the close of the prosecution.

A notice was served on the accused on the 23rd January 1871, when the trial had already proceeded three days. The notice was to produce before the Magistrate, on the 22nd January 1871, books and two letters dated prior to 1859. This notice was not

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sufficient for the final trial. The letters and book mentioned in the notice had been in the possession of the prosecution for several years. The existence of these letters was only proved by the evidence of the convicted felon Mahomed Shafi, who was allowed to give secondary evidence of their contents. The object of the notice was to enable the prosecution to give oral evidence of the book and of the letters.

The amended charges all relate to acts said to have been committed at Calcutta. The Sessions Court of Patna had no jurisdiction to try Amir Khan. The warrant was issued by the Magistrate before any of the depositions were taken. [COTCH, C. J.—The case came properly before the Patna Court, as the charge prepared by the Committing Magistrate embraced acts committed at Patna, as well as in Calcutta. You do not say that the Magistrate had not the power to commit. It is not necessary to show the entire regularity of the proceedings before the Magistrate. You might have applied to this Court to send for the record and make the requisite order: you cannot now object to the proceedings before Mr. Prinsep.] The learned Counsel then proceeded to discuss the merits of the case and the evidence.

The *Advocate-General* for the Crown.—The case is one that rests upon evidence alone. The theory put forward by the defence, that these *hundi* transactions were commercial transactions on account of the sale of books, is absurd; because it is proved that there were no book transactions between the parties. The theory that the letters were forgeries is destroyed by what was said by Amir Khan and Mosahib Ali in Major Parsons' presence.

The *Advocate-General* proceeded to read the evidence as to acts prior to the year 1861. [Mr. *Anstey* objected to this evidence being gone into.] The evidence has been gone into fully on the other side. I read this to show the acts during the period covered by the charge, *i. e.* the years 1861 and 1862; to understand them we must see the history of the case and the antecedent facts; I also read it on the ground that,

although the Judge has acquitted the prisoner (I am not opening these charges), yet the evidence of these witnesses can be looked at, because the Judge, while not disbelieving it, rejected it because it was not corroborated; yet that evidence will be a corroboration of, and would have a bearing on, the two charges on which the prisoner has been found guilty. [Mr. Anstey.—That cannot be done; there is no appeal on an acquittal. We went into that evidence only to show the contradictions between the witnesses and the strong objections which existed to the whole, and the utter untrustworthiness of the evidence on the other charges. COUCH, C.J.—The evidence is admissible to explain, particularly when the offence charged is a conspiracy.]

Three preliminary objections were taken: the first, that the warrants bore date the day before the depositions were taken, has already been disposed of; the other two were the removal of Amir Khan from the jurisdiction of the High Court, and the plea of *Autrefois convict*. To notice the second first, the act of the Governor-General, in arresting and imprisoning Amir Khan under the powers vested in him by Regulation III of 1818, was in no sense a judicial proceeding. Phear J.'s remarks (1) are misunderstood. The word "determined" in that Regulation, in the connection in which it is found, means simply resolved, and not that a question being raised between the Crown and the prisoner, the Governor-General in Council has come to a judicial determination on the point. The procedure under Regulation III is purely *ex parte* and executive in its nature, and in no sense can it be said that a decision on the merits of the case has been given under that Regulation. Phear J. only says that the warrant is a warrant of commitment, reciting that which is, by virtue of the Regulation, equivalent to a conviction. The act was a proceeding in the interests of the State. The preamble to the Regulation explains the nature of the proceeding. [Mr. Anstey.—There is no mistake about Phear J.'s meaning. At page 476 of the Report, he says, after referring to Act XXXIV of 1850, and

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(1) *In the matter of Amir Khan*, 6 B. L. R., 450, at p. 468.

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Act III of 1858 :—"The real effect of these Acts is that they create and make lawful a new cause of imprisonment, and constitute the Governor-General in Council a Court, endowed with the fullest discretion to adjudicate such a cause, and with power to imprison therefore during pleasure," which, Lord Coke says, means imprisonment for life. "It may, indeed, be taken in effect that on the present occasion the High Court has enquired into the legality of Amir Khan's imprisonment, and has ascertained that he is imprisoned under a conviction and commitment of a competent tribunal, the warrant of which conviction and commitment is good on the face of it." The preamble has the words "with a view to ulterior proceedings." [Couch, C. J.—Was the point argued at the bar whether the Governor-General acting under that Regulation is a Court?] No, the question was not argued by me. I only argued that no appeal lies from a refusal of a writ of *habeas corpus*. It certainly was not my [argument before Norman, J. [Couch, C. J.—The difficulty is that the law was laid down in this very man's case.] Norman J. based his judgment on very different grounds. There is no reason for saying that Markby J. agreed with Phear J. further than in dismissing the appeal. Phear J. made those remarks on appeal. The case was not, in its nature, an appealable matter. I urged this, but the Court gave no decision upon that point. If one Judge refused a *habeas corpus*, another Judge might have granted it. Phear J. dismissed the appeal on grounds of his own. It can hardly be said that it was the opinion of the Court that the Governor-General in Council was empowered to pass judgment and sentence, and that those proceedings might be pleaded in bar of a trial under the usual procedure. If Phear J.'s judgment does decide what it is said to lay down, I maintain it is not good law. There is nothing in the Regulation in the nature of a judicial enquiry. The preamble and the whole Regulation show that it is a statutory power given to the Governor-General in Council to imprison persons without a judicial enquiry when it is dangerous to the State to let them be at large. That Regulation is more in the nature of a permanent Statute for the suspension of the *Habeas Corpus*

Act whenever the exigencies of the State in the judgment of the Governor-General in Council may so require. The same might now be effected by the Governor-General alone in the form of a proclamation under the Councils Act for a period of six months.

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As to the question of the prisoner's removal from Calcutta, and the jurisdiction of the Patna Court, what peculiar right had Amir Khan to be tried in Calcutta? There was no birth-right, but only the right of residence. Under the statutes of William III and Anne (1), no evidence can be given in cases of treason of Acts that transpired more than three years before trial. The Penal Code introduces a new law by s. 121. There is no limitation in Calcutta or elsewhere. The offence is the same, and the punishment is the same, whether the trial takes place in Calcutta or Patna. How, then, was Amir Khan prejudiced? The English law does not apply in Calcutta. He is a native of Patna, where his family have always resided, except on two occasions. He goes and lives there himself whenever his business allows him. Calcutta is only a temporary residence to such men engaged in trade. He was charged with crimes committed at Patna and Calcutta. It is true in the result the only overt acts found as proved were committed at Calcutta, but all the other charges were pending against him then. The accusation was that he was a member of a conspiracy at Patna. These charges were afterwards amended by the Sessions Judge. [COUNC. C. J.—The offence is under the Penal Code, and must be tried by the Criminal Procedure Code. We cannot decide according to the English law of conspiracy. The crime here amounts to an abetment of conspiracy. How was the charge framed?] (*Reads the charges.*) The prisoner was found guilty under the first and third heads of the amended charge. Under the first, under Act XI of 1857, he would be liable for certain acts of abetment of the conspiracy. Under the other, the third head of charge, he would upon the evidence come under the definition of abetment contained in the Penal Code, s. 107. It really amounts substantially to a charge of conspiracy to wage war against the

(1) 7 & 8 Wm. III, c. 3, s. 5; and 7 Anne, c. 21.

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Queen with others, known or unknown, which was afterwards abetted, by different overt acts, at different times and places. It was a treason of which the focus was at Patna, where all the principal acts took place, and where Amir Khan was properly tried for such acts. If he was not properly tried there, the Government would have to institute numerous prosecutions all over the country for the same conspiracy. In *Queen v. Nelson & Brand*, the Lord Chief Justice in his charge to the grand jury does not lay down, as a general proposition of law, that a man has a right to be tried in the place where he is arrested; but that it would be an arbitrary and unwarrantable exercise of authority to remove a person from a place where he was arrested and might be tried, to another jurisdiction where he might equally be tried, if such were done for the purpose of getting the trial before a Judge who was known to be more likely to convict, or whose conviction was likely to pass a more severe sentence (1). These remarks are not at all applicable to this case. But he does not impugn the general proposition of law that a trial may take place anywhere where overt acts have taken place. There is no suggestion that Mr. Prinsep was a severe Judge, or a Judge, who was likely to convict; but upon other grounds the prisoner objected to being tried at Patna. In the case of *The King v. Briscoe* (2), it was decided that an information at common law for a conspiracy between the captain and purser of a man-of-war for planning and fabricating false vouchers to cheat the Crown, (which planning and fabrication were done upon the high seas), is well triable in Middlesex, upon proof there of the receipt by the Commissioners of the Navy of the false vouchers transmitted thither by one of the conspirators through the medium of the post, and the application there by a third person, a holder of one of such vouchers (a bill of exchange) for payment, which he there received. The application by the holder for payment in London was held to be an overt act, which gave jurisdiction to the Courts in London.

There is no doubt that a conspiracy has been proved at Patna,

(1) At p. 116 of the charge to the Grand Jury.

(2) 4 East., 164.

and Amir Khan has been found to have taken part in it. There were a great many men to be tried for their joint action, and it was more convenient to try them there than here. There may be a little hardship, but it is not illegal. Substantially and really, the conspiracy is the offence; the overt act is the evidence of it according to English law—*Reg v. Best* (1), *King v. Seward* (2), and *King v. Gill* (3).

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I shall now consider the provisions of the Criminal Procedure Code, with respect to the offence of abetting under s. 107 of the Penal Code. That section says:—"A person abets the doing of a thing, who (first) instigates any person to do that thing; or (secondly) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or (thirdly) intentionally aids, by an act or illegal omission, the doing of that thing." Under the second and third branch, Amir Khan has been properly found guilty of abetting. Even if the case be not treated as a conspiracy, it would be aiding to do a thing, &c., but I put it under the second branch. The conspiracy or agreement of several persons to act together with a common object must be proved, before evidence can be given of the acts of any person not in the presence of the prisoner. It is said in *East's Pleas of the Crown*, page 96:—"As it happens more frequently in trials for this" (i. e., the offence of high treason) "than for any other offence, that the acts of some of the conspirators, in the absence of the others, are given in evidence against them, it may be worth a more particular enquiry in what manner the rule is applied. In this, as in other cases founded in conspiracy, the conspiracy or agreement among several to act together for a particular end must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner. And this must, generally speaking, be done by evidence of the party's own acts, and cannot be collected from the acts of others, independent of his own; as by express evidence of the

(1) 2 Ld. Raym., 1167.

(2) 1 A. & E., 706.

(3) 2 B. & A., 204.

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fact of a previous conspiracy together, or of a concurrent, knowledge and approbation of each other's acts. But it may also be done by evidence of the acts of the prisoner and of any other with whom he is attempted to be so connected, concurring together at the same time and to the same purpose or particular object." What a concurrence there is here between the letters of Amir Khan to Khaja Mian Jan and those of Yahia Ali to the same man referring to the purpose for which the money was transmitted,—in both price of books, &c., and other secret terms are used! When the conspiracy is established, all the acts of the persons engaged in the common undertaking are receivable in evidence, *Reg. v. Horne Tooke* (1), *Reg. v. Hardy* (2), and *King v. Stone* (3). In a letter case of *Reg. v. Frost* (4), the Chartist trial of 1840, acts previous to the prisoners' joining were allowed to be given in evidence. In *Reg. v. Esdaile* (5), the same principle was laid down, and the doctrine was carried very far, and a rule on the ground of misdirection was refused. The third head of charge also was properly tried at Patna. By s. 28 of the Criminal Procedure Code, the abetment of an offence may be enquired into and tried by the Court which would have jurisdiction to try the offence abetted. The offence here is the conspiracy at Patna. [COUCH, C.J.—The offence is waging of war. There was no war in Patna.] It would be abetment of an abetment which of itself is an offence. [MACPHERSON, J.—The prisoner is not charged with that.] True, the charge is not put in that specific form, but considering that the substance of the accusation was conspiracy, it matters little whether these overt acts are treated as abetment of the conspiracy or as abetment of an abetment of that conspiracy, so that the Court could give judgment upon that. Although the entries of these moneys were made in Calcutta, yet they could be enquired into at Patna, because the abetment was in Patna of an abetment of the offence of waging war. It comes round very nearly to the English law. If there are 100 men to be tried for abetting in various ways and at different

(1) East's Pleas of the Crown, 98.

(2) *Ib.*, 99.(3) *Ib.*, 99.

(4) 9 C. & P., 129.

(5) 1 F. & F., 213.

places with one common design, they are guilty of acts of abetment of the principal offence.

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I must call attention to another part of the case without making a distinct point of it, *vis.*, the acquittal on several charges. These acquittals were on the ground that they were supported by the evidence of accomplices who were not corroborated, although the Judge believed the witnesses, but he thought he was bound by the rule that required corroboration of the evidence of an accomplice. The Court can look into that evidence to see Amir Khan's connection with the conspiracy, and in confirmation of other evidence. [Couch, C. J.—Does not that evidence require corroboration before we look at it?] Your Lordships can read it and say whether it is not sufficient evidence on collateral points. Suppose the Judge cautions the jury properly against the danger of believing such evidence, but notwithstanding such caution, the jury believe the evidence, they may act upon it, and their verdict cannot be set aside; so if the Judge believe it, why may he not act upon it? [Couch, C. J.—Suppose that to be so, we are not bound to believe, because the Judge might have believed. We shall require corroboration. This is merely a rule of practice as to what weight should be given to the evidence of an accomplice.] The Judge has treated it as a stringent rule of law binding on him, without allowing him to exercise his discretion as to the acceptance or rejection of the evidence of any particular witness if that witness was not to be depended on. He rejects evidence which he evidently believed. [Couch, C. J.—Do you mean to say that one can act upon evidence not corroborated, and which three assessors have disbelieved?] Yes, corroboration is not necessary. [Couch, C. J.—We should be setting a bad example.] Supposing it to be even a rule of law, and not one of practice merely, it would not exclude the evidence as to collateral matters. In *The Queen v. Stubbs* (1), it is laid down that “it is not a rule of law but of practice only that a jury shall not convict on the unsupported testimony of an accomplice. Therefore, if a jury choose to act on such evidence only, the conviction cannot be quashed as bad in law.” So too in *The Queen v. Elahi Bax* (2),

(1) 25 L. J. Rep., M. C., 16.

(2) Case No. 186; 29th May 1866.

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it was laid down that "a conviction founded upon the uncorroborated evidence of one or more accomplices alone is valid in law."

(After stating the facts and circumstances, as already stated to show Amir Khan's connection with the conspiracy, the Advocate-General proceeded) :—The letters in *Reg. v. Burnardiston* (1), were totally different from the letters in this case. They were in plain ordinary language, and had a natural meaning of their own, but it was attempted to make them treasonable by strained meanings of words and expressions employed in them : but the letters here were not reconcilable with any natural meaning, or with any theory of commercial business, and could only be understood by those who understood their real and secret meaning.

Whether the true doctrine of the Koran and the Mahomedan religion be to make war against the British Government or not, does not touch the question of Amir Khan's guilt or innocence. It is proved that certain persons consider such war a religious duty, and that fights have taken place between them and the British troops, and Amir Khan has done acts to abet such waging of war.

Mr. Anstey in reply.—The evidence as to the earlier matters being disbelieved by the Judge, the prosecution is reduced to the solitary case of the three hundis which rests on the most dangerous of all kinds of evidence. It seems to have escaped the attention of my learned friend that neither Nabakrishna Ghose nor Major Parsons was present at the arrest of Kazi Mian Jan, or knew anything about his arrest.

The only evidence is that of approvers and accomplices, and of these moreover some were prisoners and convicted felons, and many had received rewards and remissions of parts of their punishments from Government. The account books do show the sale of books and also of salt, but the persons to whom those sales purported to have been made, and who ought, in fairness to the defendants, to have been called by the prosecution, were not so called.

(1) 16 How St. Tr. 323.

The consideration of treason is apparently omitted from the Penal Code from design. Abetment seems to have been intended to take its place. Abetment has taken the place of conspiracy. The learned Advocate-General says there may be an Abetment of an abetment. Such an interpretation of the law ought not to be allowed. If Abetment of Abetment is allowed, why should it not be allowed to go on from 1861 to 1871, and then to 1881, and so on to eternity, generation after generation ?

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The Advocate-General's view of *The Queen v. Elahi Bax* (1) is imperfect. The accomplice knows all the secrets and facts, and has only to name persons to destroy them ; that is the reason Lord Abinger gave, Sir Barnes Peacock gave, and Mr. Justice Jackson gave, for discrediting an accomplice. Here evidence was giving under the pressure of fear and under a hope. This last remark is applicable to nearly all the witnesses. Confessions drawn by promises of favor are not receivable, but these were obtained by artifice, promise, &c. It rests with those who bring such confessing into Court to show that there was no influence exercised over the mind of the witness. The Judge says the Code of Criminal Procedure has been violated ; yet he has received and given full effect to such evidence. If it is a rule of practice, it is a rule of law. It is the same thing to a Judge, though it may be open to a jury to act upon such evidence. In this case it is a rule of law, and not of practice, see s. 28, Act II of 1855. That Act must be read *in pari materia* with the Penal Code. It was not in the discretion of the Judge to take into consideration the evidence not corroborated.

It appears from a pamphlet report of the arguments that the learned Advocate-General argued that the sole jurisdiction was with the Governor-General, and the case was concluded. [The *Advocate-General*,—I have said that I did not argue the point. The argument did not turn upon that question at all. It is a mistake in the report.]

COUCH, C.J.—In this case the appellant, Amir Khan, has been convicted by the Sessions Judge of Patna of the offence of

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abetment at Calcutta of waging war against the Queen in the years 1861, and 1862; the first charge being laid as an offence under Act XI of 1857, and the second as an offence under s. 121 of the Penal Code.

The learned Counsel for the appellant, Amir Kan, took three preliminary objections on his behalf. The third objection, namely, that the proceedings before the Magistrate who committed the case for trial were irregular, in that none of the depositions were taken before the accused persons were brought before him (as I understand the objection), was disposed of in the course of the argument. It is clear, upon the decisions of this Court, as well as upon the decision of the High Court of Bombay, that such an objection as that ought not to prevail and I do not think it necessary to say anything more with regard to it (1).

The first of the remaining two objections was that the Sessions Court at Patna had no jurisdiction to try the accused for offences which were committed at Calcutta.

Now, by s. 4, Act XVII of 1862, it is provided that, "in the investigation and trial of offences committed before the 1st day of January 1862, the Criminal Courts of the several grades, and the Officers of Police, shall, after the passing of this Act, be guided by the provisions of the Code of Criminal Procedure so far as the same can be applied, wherever the said Code shall be in operation at the time of such investigation or trial; and for the trial and punishment of such offences, such Court, shall exercise the jurisdiction and powers vested in them under the said Code of Criminal Procedure: provided that no person convicted of any such offence shall be liable to any other punishment than that to which he would have been liable had he been convicted of such offence before the said 1st day of January 1862, and that no such person, who shall claim the same, shall be deprived of any right of appeal or reference to a Sudder Court which he would have enjoyed had the trial been held under any of the Regulations or Acts hereby repealed." These words, which are very extensive, "shall exercise the jurisdiction and

(1) See *The Queen v. Narayan Naik*, 5 B. L. R. 660.

powers vested in them under the Code of Criminal Procedure," would give to the Sessions Court at Patna jurisdiction to try the accused, Amir Khan, not only for the offence which was charged to have been committed contrary to the provisions of the Penal Code, but also for the offence under Act XI of 1857. In order to see whether there was jurisdiction, we must look to the provisions of the Code of Criminal Procedure. S. 26 of that Code provides that, "except where otherwise expressly provided by this Act, every offence shall be enquired into and determined in the district in which the offence was committed: provided that nothing in this section shall exempt European British subjects from being tried and convicted before the Supreme Courts of Judicature for offences committed beyond the local limits of such Courts." Then comes s. 27, which does not apply here; and the next section, which is applicable to the present case, is s. 28, which provides that "the abetment of an offence, wherever such abetment shall have taken place, may be enquired into or determined in any district, or division of a district, in which the offence abetted may be enquired into or determined by any Court which has jurisdiction to try such offence, as if the abetment had been committed at the same place at which the offence abetted was wholly or partly committed; or the abetment may be enquired into or determined in any district, or division of a district, within which the abettor has done anything for abetting the commission of such offence." The offence of which the accused Amir Khan has been convicted is the abetment of waging war against the Queen, the act abetted having been committed, and the abettor, therefore, being liable to the punishment for the offence of waging war against the Queen, as provided by s. 109 of the Penal Code. Now the waging of war did not take place in the district of Patna; and the part of this section (28), which is applicable to the present case, is the latter, which provides that the "abetment may be enquired into, or determined in any district within which the abettor has done anything for abetting the commission of the offence." The abetment charged against Amir Khan was that he had engaged in a conspiracy to wage war against the Queen, which was an offence under s. 107 of the Penal Code

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That section provides that "a person abets the doing of a thing who instigates any person to do that thing, or engages with one or more other person or persons in any conspiracy for the doing of that thing, if any act or illegal omission takes place in pursuance of that conspiracy and in order to the doing of that thing." That was the abetment charged, and of which Amir Khan has been found guilty by the Sessions Court. Now, the rule of law is that, where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of law, the act of the whole. Each party is an agent of the others in carrying out the objects of the conspiracy and doing anything in furtherance of the common design. This was determined in England in the case of *Rez v. Bowes* (1), cited by Grose, J., in *The King v. Brissac* (2), and cited to us by the learned Advocate-General, and the law has, from the period when that case was decided, been the settled law in England. It rests upon a principle which is equally applicable in this country. There is not any peculiarity of English law in this matter, but it rests upon the general law which has been stated that, where parties concert together, and have a common object, the act of one of the parties done in furtherance of the common object and in pursuance of the concerted plan, is the act of the whole of them. To apply that principle to the present case. If it were proved that Amir Khan engaged in a conspiracy to wage war against Her Majesty, acts done within the district of Patna by any one of the persons with whom he so engaged in pursuance of the original concerted plan, and with reference to the common object, would be, in point of law, the acts of the accused Amir Khan; and it would be the same as if he himself had done the acts within the district of Patna, although at the time he might not be there, and might be remaining at Calcutta. Thus, the case is, in my opinion, brought within the provisions of s. 28 of the Code of Criminal Procedure, the

(1) 4 East., 171.

(2) 4 East., 164.

abettor having done something for abetting the commission of the offence within the district of Patna, and that appears to me to be one and a conclusive answer to the objection taken to the want of jurisdiction in the Patna Courts to try Amir Khan for the abetment of waging war against the Queen, of which he has been convicted. I do not think that the offence committed can be regarded as the abetment of an abetment. It was not that Amir Khan abetted other persons to abet the waging of war; he engaged with other persons in a conspiracy to wage war, and did acts in furtherance of that conspiracy.

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There is another way in which the matter may be regarded, which equally affords an answer to the objection of want of jurisdiction. In this case the acts of abetment of which the Sessions Court has found the prisoner guilty are the sending of money on several occasions from Calcutta to Patna, in furtherance of the common design that that money should be made use of in waging war against Her Majesty. Now, the money was received at Patna, and sent by Amir Khan there through hundis, as proved by the evidence; and until that money reached its destination, the sending, in point of law, continued on the part of Amir Khan; the money was in the process of being sent to the persons by whom it was intended to be received until they received it at Patna, and there was, in that view of the case, a sending of the money by Amir Khan within the district of Patna, where he has been tried and convicted. It is on this principle that it has been held, and it is considered settled law, that an indictment for sending a threatening letter may be tried either in the county in which the offender sent the letter, or in the county in which the prosecutor received the letter; and, in like manner, in the case of a libel or letter containing a challenge, if the letter be sent from one county to another, the trial may take place in either county. That is applicable to this case of sending the money, and would, if there was not an answer to the objection of want of jurisdiction on the ground I have previously stated, afford in itself a sufficient answer to that objection. In my opinion, therefore, the Court at Patna had jurisdiction to try the accused Amir Khan for this offence, of which he has been convicted.

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There is, no doubt, an apparent want of jurisdiction on the face of the proceedings, because both the charges upon which the conviction has taken place allege that the abetment was "at Calcutta," and there is this apparent inconsistency, that the Sessions Court at Patna has found the accused guilty of an offence committed at Calcutta. But that is an error or defect in the charge, which is cured by s. 426 of the Code of Criminal Procedure (1). The charge might and ought properly to have been a charge of the offence of abetment at Patna; and then evidence might have been given, not merely of what he did at Calcutta, but of what the other conspirators did at Patna. It cannot be said that the defect is not one to which s. 426 would apply, or that the accused has been in any way prejudiced in his defence by the erroneous statement of the abetment having taken place at Calcutta, when the evidence was sufficient to show an abetment at Patna. In truth, the proper mode of framing the charge would have been that all the conspirators should have been jointly charged with the conspiracy, it being alleged to have been an abetment at Patna, and then the acts of the various conspirators in Calcutta and in Patna might have been given in evidence, and there would have been jurisdiction to try the accused at Patna if any acts were done in Patna. Had the accused been so charged in this case, there would have been no plausible ground even for the objection that the trial should not have been held at Patna. It cannot be contended that it is not proper or right where persons are engaged in a conspiracy that they should be tried at the chief place of conspiracy; and that is really

(1) S. 426.—"No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error or defect, either in the charge or in the proceedings on trial, unless the accused person shall have been sentenced to a larger amount of punishment than could be awarded for the offence of which, in the judgment of the Appellate Court, the accused person ought, upon the evidence, to have been found guilty, or unless, in the judgment of the Appellate Court, the accused person shall have been prejudiced by such error or defect; and in case the accused person shall have been sentenced to a larger amount of punishment than could have been awarded for the offence which, in the judgment of the Appellate Court, is proved by the evidence, the Appellate Court may reduce the punishment within the limits prescribed by the Indian Penal Code or any law for the time being in force for such offence."

what has been done in the present case. This disposes of the first of the two preliminary objections.

Then the second objection, which was taken by the learned Counsel for Amir Khan, was that Amir Khan had already been tried, convicted, and punished.

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I am now speaking of these two objections as applying to the case of Amir Khan only; but, in fact, they apply to the other accused persons as well, and it will not be necessary to repeat the remarks which I have to make with regard to Amir Khan's case when I come to deal with the case of the others.

With respect to this objection, the learned Counsel relied upon the judgment of Phear, J., *In the matter of Amir Khan* (1). The matter was then before Phear, J., on the appeal from the decision of Norman, J., on an application for a writ of *habeas corpus*. The first passage on which the learned Counsel relied, and to which he called our attention, is to be found at page 468 of the Report, where Phear, J., speaking of the warrant which had been issued under Regulation III of 1818, says:—"It is a warrant of commitment reciting that which is, by virtue of the Regulation, equivalent to a conviction." In a subsequent passage, to be found at p. 476, the learned Judge says, after noticing the Acts of Parliament and the Regulations with regard to the power of the Governor-General in Council, to commit persons and keep them in custody:—"The real effect of these Acts is that they create and make lawful a new cause of imprisonment, and constitute the Governor-General in Council a Court endowed with the fullest discretion to adjudicate such a cause, and with power to imprison therefore during pleasure. It may indeed be taken in effect that, on the present occasion the High Court has enquired into the legality of Amir Khan's imprisonment, and has ascertained that he is imprisoned under a conviction and commitment of a competent tribunal, the warrant of which conviction and commitment is good on the face of it." It appears that in the present case the commitment actually took place on the 10th July 1869; and it is to be observed that what Phear, J., said was with reference to a

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warrant dated the 10th August 1870, in the case of *In the matter of Amir Khan* (1), which is in the form given in the Regulation. But we may assume that there was some warrant in a similar form previously; and, if not, still the objection which the learned Counsel took would arise, namely, that there had been a commitment amounting to a conviction by the Governor-General in Council under the Regulation, and a subsequent discharge of the persons who had been so committed. Now Mr. Anstey and also Mr. Ingram, who followed on the same side, contended—and it was necessary for them to contend—that Amir Khan, having been committed under Regulation III of 1818, and afterwards discharged, could not be punished for any political offence committed previously to that commitment. That, as I understand, was the objection. They urged that that gave him immunity from all political offences (it cannot be supposed that the argument went beyond that) committed before that period; and it was necessary for them to go to that extent; because the warrant of commitment being in the general form given in the Regulation, no offences were specified in it, and there would be no means of ascertaining for what particular offence (if their view is correct), the commitment had been made. The opinion expressed by Phear, J., in the passages I have referred to appears to be very distinct; and it has become necessary for us to consider whether we can concur in it. With every respect for the learned Judge by whom that opinion was pronounced, I am unable to concur in it, and it appears to me to be opposed both to the preamble and to the enactment in the Regulation III of 1818. The preamble of that Regulation says:—"Whereas reasons of state, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of native princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion, occasionally render it necessary to place under personal restraint individuals against whom there may not be sufficient ground to institute any judicial proceedings.

(1) 6 B. L. R., 434.

or when such proceeding may not be adapted to the nature of the case, or may, for other reasons, be unadvisable or improper; and whereas it is fit that, in every case of the nature herein referred to, the determination to be taken should proceed immediately from the authority of the Governor-General in Council; and whereas the ends of justice require that, when it may be determined that any person shall be placed under personal restraint, otherwise than in pursuance of some judicial proceeding, the grounds of such determination should from time to time come under revision." The language of the preamble points to cases where a commitment may be made when there are not sufficient grounds for a judicial proceeding, or when a judicial proceeding may not be adapted to the nature of the case, or when it may be determined that the person shall be placed under personal restraint otherwise than in pursuance of a judicial proceeding. Looking to that language, I am unable to see that the Legislature intended that the Governor-General, in issuing a warrant of commitment under this Regulation, was in any way to act as a Court of Justice, or to act judicially, or to be considered as having adjudicated that the person placed under personal restraint had been guilty of some specific offence; I am unable to see that this proceeding was at all intended to be treated as in the nature of a conviction of the person so placed under personal restraint. That is the language of the preamble. Then the other parts of the enactment are consistent with the preamble, and show again what was the intention of the legislative authority by which this Regulation was passed. S. 2, says:—"When the reasons stated in the preamble of this Regulation may seem to the Governor-General in Council to require that an individual should be placed under personal restraint, without any immediate view to ulterior proceedings of a judicial nature, a warrant of commitment under the authority of the Governor-General in Council, and under the hand of the Chief Secretary, or of one of the Secretaries to Government, shall be issued to the officer in whose custody such person is to be placed." The form of the warrant is next given, and it states "that, whereas the Governor-General in Council, for good

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and sufficient reasons, has seen fit to determine that ~~(the prisoner's name)~~ shall be placed under personal restraint at ~~(the name of the place)~~; you are hereby required and commanded, in pursuance of that determination, to receive the person above named into your custody," and so on. There is nothing to my mind, in the language here used, which points to the proceeding being in the nature of a judicial proceeding, or of a conviction of the person placed under restraint. The whole of the Regulation indicates that what was intended was what is expressed by my lamented colleague, Norman, J., in his judgment, when he refused the writ of *habeas corpus*, namely, that the Regulation does no more than give to the Governor-General in Council a power analogous to that which the Parliament of the United Kingdom exercises when by legislative enactment it suspends the *Heabeas Corpus* Act. That is more like what the proceeding is than what the learned Council for Amir Khan compared it to; and Markby, J., who sat with Phear, J., on the occasion when the opinion I am now considering was expressed by Phear, J., does not appear to have concurred in the view which that learned Judge took of this question. Markby, J., concurred in refusing the writ of *habeas corpus*; but he gave his own reasons for doing so; and I do not find that he assented to the proposition which had been laid down by Phear, J.; and certainly Norman, J., did not take that view of the matter, because he expressed himself quite in the opposite way. After carefully considering the language of this Regulation, I must come to the conclusion that there is not in this case any real ground for the objection taken by the learned Counsel that the accused had already been tried and convicted and punished for the offence with which he was charged before the Sessions Court at Patna. It was said that this proceeding, under Regulation III of 1818, was like a proceeding by a Bill of Pains and Penalties, and we were referred to *Bishop Atterbury's Case* (1) in the State trials. But there is no similarity in the proceedings. The Bill of Pains and Penalties was a conviction by Act of Parliament of

a person for an offence, or an attaching to the offence of which the person was found guilty certain pains and penalties which went beyond the common law, and was a bar to a subsequent prosecution in respect of the same matter, on the principle that a person once convicted cannot be tried again. As I have said when we look to the language of Regulation III of 1818, it does not attach such consequences to a commitment by the Governor-General in Council for good and sufficient reasons. This disposes of the second of the preliminary objections which were taken on behalf of Amir Khan.

It now becomes necessary for us to consider the evidence in the case, and see whether that was sufficient to support the conviction. The offence charged being the abetment of waging war against the Queen, and the punishment being, as I have stated, the punishment which is to be awarded where the offence abetted has been committed, it was necessary in the first instance to prove the actual waging of war. Although probably little doubt could be entertained that war was waged, yet on the trial it was necessary that evidence should be given on that point.

(His Lordship then read the evidence of Mahomed Israil and proceeded):—There then is evidence that during the period to which the charge against Amir Khan is applicable, there was a waging of war against the English Government, against Her Majesty the Queen.

(After reading the evidence of Jan Mahomed, His Lordship proceeded):—These two witnesses show beyond doubt that there was a waging of war.

Then what is the evidence as to the abetment, of waging of war? Now I do not think it necessary to go through the evidence either of Abdulla Kowidi or Abdul Gaffur. The Judge says, as to both of these witnesses, that it would not be safe to rely upon their uncorroborated statements; and for that reason it was that the accused Hashmadad Khan was acquitted entirely and Amir Khan was acquitted of certain of the charges against him. The Judge says that Abdulla Kowidi gave his evidence in a manner which impressed him favorably: that there was a calmness and self-possessed demeanor in the witness in giving

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his evidence. It is possible that the Judge may have attributed too much to that demeanor: it might be the demeanor of a man who was an adept in giving false evidence, as well as of a man telling the truth. I am not inclined to place reliance on the testimony of either of these witnesses.

(After reading the evidence of Abdul Karim, His Lordship proceeded):—The witness is here speaking of some matters which occurred before 1859, and therefore before the time at which this abetment is charged to have been committed; but this is evidence against Amir Khan, and is so far of importance as tending to show that he had then engaged in the conspiracy; and it is to be taken with other evidence, showing that the conspiracy in which he was so engaged continued, and that he continued to be engaged in it.

(After reading the evidence of Hosseini and Moazim Sirdar, His Lordship proceeded):—In reading the depositions of these witnesses, I do not forget that they are accomplices, and require corroboration.

(His Lordship then read the evidence of Kazi Murad, Daimala, and Amir Khan of Pubna, and speaking of the last witness, proceeded):—This witness, if corroborated, appears to me to show, conclusively, that Amir Khan was engaged in this conspiracy. The question then arises what corroboration there is of the statements of Amir Khan of Pubna. I must say how, ever that perhaps it is scarcely right to treat this witness as an actual accomplice, though he does show by his evidence that he knew what the money was intended for which he took part in remitting.

Now the corroborative evidence relied upon consists in the three letters, LI, MIA, and NIA, which were found in Kazi Mian Jan's house. It was objected as to these letters by the learned Counsel for Amir Khan that Kazi Mian Jan had been previously arrested, and that letters found in his house, subsequent to his arrest and whilst he was in custody, could not be used in evidence. But that rule of evidence is subject to this exception that, if the previous existence of the letters found is established, either by direct proof, or by strong presumptive evidence, the objection that they were found after

the arrest of the party in whose house they were found cannot prevail. The reason for not allowing them to be received in evidence would not apply in such a case; that reason being that it is necessary to guard against the possibility of persons, after a man has been arrested and is in custody, placing in his house papers which might be used to criminate him. But if the evidence shows that the papers were in existence before the arrest, then the papers may be used in evidence. And the evidence, which I am now about to notice, shows, I think, conclusively, that these letters were in existence previous to the arrest of Kazi Mian Jan. I do not know that it does not appear that he had been arrested before the search of his house; but I do not think that is material, seeing what the evidence is with regard to these letters.

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(After reading the evidence of Mosahib Ali, His Lordship proceeded):—This witness, if believed, shows that these three letters were written by him by direction of the accused Amir Khan. His position, no doubt, is the position of a witness who requires some corroboration, and upon whose unsupported testimony it would not be safe to rely. But we have most material evidence in support of what this man says, and that is the evidence of Major Parsons. Major Parsons says that he is District Superintendent of Police, Rajshahye. Then he speaks of having searched the house of Mahomed Jaffer at Thaneshwar, and found certain letters there; he then says:—"I proceeded to Calcutta, where I searched the house of Amir Khan (the prisoner) in company with Mr. Reily, Nabakrishna Ghose, and some Calcutta Police. I asked Amir Khan for an explanation of statements made in some letters found in Kazi Mian Jan's house at Comarcolly, supposed to have been written by him, in which allusion was made to money having been forwarded to Patna. He pointed to a munshi sitting there, whose name I afterwards ascertained to be Mosahib Ali, and said that munshi had written the letters."

(After reading the rest of Major Parsons' evidence and commenting upon it, His Lordship proceeded):—A doubt has occurred to us in the course of the consideration that we have given to this case, although the point was not taken

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by the Counsel for the accused. The doubt to which I allude is as to whether the evidence of Major Parsons as to what Amir Khan said and did when he searched the house, can be said to be an admission or confession of guilt made to a Police Officer (for Major Parsons was a Police Officer), and as such inadmissible in evidence according to s. 148 of the Code of Criminal Procedure. But it does not appear to me that in what passed there was any admission or confession of guilt such as is contemplated by s. 148. Supposing, however, it to be doubtful whether what Amir Khan actually said could be used in evidence, I entertain no doubt that his conduct at that interview, when he was distinctly informed of what these letters were, and when his servant Mosahib Ali said that he had got orders to write them, in not denying that statement, and not attempting to offer any explanation of it, is admissible in evidence against him. I think s. 148 of the Code of Criminal Procedure cannot be carried to the extent of excluding such evidence as that.

The case then stands thus. There is against the prisoner Amir Khan, not putting aside, but not placing entire reliance upon the evidence of persons who may be regarded as accomplices, the evidence of Daimulla about the money being sent, the evidence of Amir Khan of Pubna, and the important evidence of these letters, as to the contents of which, and as to their referring to money which was to be sent for purposes of the *jehad*, I think there can be no doubt.

(After reading the letters L1, M1A, and N1A, His Lordship proceeded):—Now it was argued by the learned Counsel for Amir Khan that a meaning such as was put forward in the case for the prosecution ought not to be attached to the expression “sale of books” used in these letters. If we take these letters in connection with the evidence of the witnesses, especially that of Amir Khan of Pubna, it is clear that these remittances were not made on account of the sale of books, but for some other purpose; and then it comes to this, that the expressions contained in these letters were evidently used for the purpose of concealment; and the letters themselves very strongly corroborate the evidence which the

witnesses on the part of the prosecution give. I have not alluded to the other letters which were found in Mian Jan's house. The reason why I have not done so is, that the handwriting of those letters appears to be proved only by accomplices, such as Abdul Gaffur and Elahi Bax; and their evidence not having been corroborated in this respect, I have not thought it safe to rely upon those letters. In regard to the three letters L1, MIA, and NIA, the evidence is of a very different nature; and upon that evidence I can come to no other conclusion than that the prisoner Amir Khan was a party to this conspiracy, and did acts in furtherance of the objects of the conspiracy; and therefore I think that he has been properly found guilty by the Sessions Judge of Patna upon these two charges, and that his conviction ought to be affirmed.

Having disposed of the case against Amir Khan, his Lordship proceeded to consider the case as against the other appellants.

Mr. *Evans* and Mr. *Lingham* appeared for Tobaruk Ali and for Mobaruk Ali.

Mr. *Ghose* for Haji Din Mahomed and for Aminudin.

The plea of *autrefois convict* was taken on behalf of these prisoners. The evidence against all was objected to, as being that of accomplices, without any trustworthy corroboration.

Couch, C. J.—The preliminary objections taken in the case of Amir Khan, in so far as they apply to the case of these prisoners may be considered as already disposed of, and the judgment in Amir Khan's case on those objection applies equally to their cases.

I proceed to consider, first, the case of Tobaruk Ali, who has been convicted of waging war against the Queen at Umbeyla in 1868.

(His Lordship, after reading the evidence of Nur Shah Ali and of Sanata, proceeded):—It is difficult to see in what other way evidence of this character, as to persons engaged in the fight, could be obtained, except by the Government instituting

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as to which Jaya Narayan speaks, we cannot, I think, rely upon the evidence of this witness sufficiently to sustain the conviction of Aminuddin. I think his conviction must be reversed. This disposes of all these appeals. The result will be that the convictions and sentences with regard to Amir Khan and Tobaruk Ali will be affirmed; and the convictions and sentences in the cases of Mobaruk Ali, Haji Din Mahomed, and Aminuddin will be reversed, and the said prisoners Mobaruk Ali, Haji Din Mahomed, and Aminuddin will be released.

[ORIGINAL CIVIL.]

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 April 24 &
 26, &
 May 6.

Before Mr. Justice Macpherson.

BISWANATH CHUNDER v. S. M. KHANTAMANI DAS
AND ANOTHER.

Hindu Widow, Alienation by—Champerly—Unfounded Charges of Extravagance and Profligacy—Costs.

K. D., a Hindu widow, having applied to H. S. to aid her in leaving the family dwelling-house of her late husband, G. C. C., where, she alleged, she was improperly treated and placed under restraint by the plaintiff, her husband's sole surviving brother, H. S., at his own cost, enabled her to do so. She then applied to H. S. to advance funds for the payment of certain debts incurred by her in consequence of the plaintiff's refusal to pay her any portion of the family estate, to allow, her a monthly sum for maintenance, and to manage and conduct for her a suit, which she proposed to institute to establish her right to a portion of the joint estate, and H. S. consented to do so upon certain terms, which were embodied in a deed by which K. D. assigned to H. S., all her right, share, and interest, as widow of G. O. C., in the joint estate, and in the accumulations thereof, and in the separate estate of G. C. C., and all benefit to be derived from the intended suit; on trust; first, to re-pay all the costs of the suit; secondly, to retain, by way of remuneration for managing the suit, one-half of what might be recovered therein; and, thirdly, to hold the residue as security for re-payment, with interest at 12 per cent. of the sums advanced by H. S., the surplus after satisfying all such sums to be paid to K. D. Then K. D.; with the aid and under the management of H. S., brought a suit against the plaintiff and other members of the joint family of G. C. C., for a declaration of her rights under the will of his father R. C., and for the administration of G. C. C.'s share of the joint estate. The result of this suit was that K. D. (was among other things) declared entitled as a

Hindu widow to Rs. 1,01,302-14-10, in respect of the accumulations of the joint property, between the dates of B. C.'s and G. C. C.'s deaths. The plaintiff paid the Rs. 1,01,302-14-10 into Court under an order made in the suit. K. D. subsequently obtained an order under which she took this sum out of Court, notwithstanding that the plaintiff applied for an injunction to restrain her taking it out. Upon her obtaining that order, the plaintiff, as immediate reversionary heir of G. C. C., instituted the present suit against K. D. and H. S., to restrain K. D. from taking the Rs. 1,01,302-14-10 out of Court, and to compel her to bring back any portion thereof which she might have already received and for a declaration that the assignment to H. S. created no valid charge thereon. *Held* (following the decision in the case of *Grose v. Amirtāmayi Dasi* (1) that the assignment to H. S. was not binding on the reversionary heirs of G. C. C., except as regards the charge on one moiety for expenses incurred and advances made by H. S., whether by way of maintenance or otherwise, with interest thereon at 12 per cent.

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THIS was an action against a Hindu widow, instituted by the plaintiff as the immediate reversionary heir of her late husband for the purpose of securing his reversionary rights over certain moneys to which the defendant had been declared entitled. The following were the facts of the case:—Ramtanu Chunder, a Hindu, died in 1836, having first made his will, and leaving him surviving five sons, Nilmani Chunder, Golak Chandra Chunder, Gakul Chandra Chunder, Madhusudan Chander, and the present plaintiff, Biswanath Chunder. Madhusudan Chunder and Golak Chandra Chunder died intestate and without male issue, but leaving widows; in 1860, after their deaths, Gakul Chandra Chunder died intestate and without male issue, leaving his widow, the present defendant, him surviving; and in 1864 Nilmani Chunder died leaving a widow and an adopted son Prankrishna Chunder. The defendant continued to reside in the family dwelling-house of her husband and his brothers till 1864, when, in consequence, as she alleged, of improper treatment and restraint on the part of the plaintiff, she applied to the second defendant Hiralal Seal to aid her in obtaining relief from such treatment and restraint. He did so aid her at his own cost and enabled her to leave the family dwelling-house. After this she applied to him to advance funds for the payment of certain debts which she had incurred in consequence of the plaintiff's refusal to pay her any portion of

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the joint estate, to allow her a monthly sum for maintenance, and to manage and conduct for her a suit which she proposed to bring to establish her rights to a portion of the joint estate. The defendant Hiralal Seal thereupon agreed to make such advances and maintenance allowance, and to institute and carry on at his own charge such intended suit upon certain terms to which the defendant Khantamani Dasi agreed, and which were embodied in a deed executed by her on 24th December 1864. By this deed she assigned to one Gopal Chand Mullick *benami* for the defendant Hiralal Seal, all her right, share, and interest, as the widow of Gopal Chandra Chunder, in the estate of Ramtanu Chunder, and the subsequent accumulations thereof down to the time of recovery in the said intended suit, and in the separate estate of her late husband, and all benefit and advantage to be derived from the intended suit, in trust, first, to repay all the costs of the suit; and, secondly, to retain, by way of remuneration for managing the suit, one-half of the amount that might be recovered therein, and to hold the residue as a security for repayment, with interest at 12 per cent. of the sums advanced by the defendant Hiralal Seal to her; the surplus, after satisfying all such sums to be paid over to her, her heirs, representatives, or assigns. After the execution of the above assignment, the defendant Hiralal Seal, at the defendant Khantamani's request, increased her monthly allowance for maintenance, in consideration whereof, and in consequence of the death of Gopal Chand Mullick, the defendant Khantamani, on 20th September 1865, executed a fresh assignment to Hiralal Seal to the same effect as the previous one. After the date of the second deed, the defendant Khantamani, with the aid and under the management of the defendant Hiralal Seal, instituted a suit against the present plaintiff, Prankrishna Chunder, and the widows of her brothers-in-law, for a declaration of her rights under the will of Ramtanu Chunder, and for the administration of her husband's share of the joint estate. The decision in that suit was appealed against, and the decree on appeal declared Khantamani Dasi entitled to Rs. 1,01,302-14-10 in respect of the *corpus* of the property which she had inherited from her husband, being one equal fifth part of the accumulations

and increase of the joint property which had accrued from the death of Ramtanu Chunder down to the time of her husband's death, and which the decree of the lower Court had declared her entitled to hold, possess, and enjoy as a Hindu widow in the manner prescribed by Hindu law; and it ordered an account to be taken of the gains and profits which had accrued upon the said one-fifth share of the said accumulations from the date of Gakul Chandra Chunder's death, to which gains and profits the lower Court had declared Khantamani absolutely entitled. In March 1869, the plaintiff, under an order made in the suit, paid Rs. 1,01,302-14-10 to the credit of the suit, and subject to the further order of the Court; and in May 1870, under another order of Court, the plaintiff paid to the defendant Rs. 4,000 in full satisfaction of her claims in respect of the gains and profits, which had accrued since her husband's death upon this fifth share of the accumulations of the joint estate. Finally, on 9th March 1871, the defendant Khantamani, obtained an order for the payment out of Court to her of the Rs. 1,01,302-14-10. This order had been opposed by the plaintiff, who applied for an injunction to restrain Chantamani from taking the money out of Court, but his application had been refused, and the money had been, paid to her. Upon her obtaining the order, the plaintiff brought the present suit against Khantamani Dasi and Hiralal Seal. He stated in his plaint that, as the immediate reversionary heir of Gakul Chandra Chunder, he would be entitled upon Khantamani's death, to the Rs. 1,01,302-14-10 which he had paid into Court; that the suit instituted by her was not for her own, but for the defendant Hiralal Seal's benefit, who, in virtue of the assignment to him, claimed to be beneficially entitled to one-half of the Rs. 1,01,302-14-10; that she threatened under the order of 9th March 1871, to take the Rs. 1,01,302-14-10 out of Court, and that he was apprehensive that, if she were allowed to do so, she would pay one-half to the defendant Hiralal Seal, and would squander the remaining half. He further stated that the interest of the money paid into Court was sufficient to defray the maintenance charges and other necessary expenses of the defendant Khantamani. He accordingly

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prayed that the Rs. 1,01,302-14-10 might be retained in Court, and for a perpetual injunction restraining the defendant Khantamani from taking it out of Court, and, if necessary, that the order of 9th March 1871 might be cancelled, and that, if Khantamani had already taken the money out of Court, she might be ordered to bring it back; that the defendant Hiralal Seal might be restrained from receiving any part thereof, or be directed to pay back any part thereof, which he might already have received; for a declaration that the assignment to Hiralal Seal created no valid charge upon the Rs. 1,01,302-14-10, and that, if necessary, he might be directed to deliver up the assignment to be cancelled; and if it appeared that the defendant Hiralal Seal had made any actual advances to the defendant Khantamani under color of the assignment, then, if necessary, for an order that such advances should be repaid out of the interest of the Rs. 1,01,302-14-10, or from such other funds of the defendant Khantamani as the Court should deem fit, so that the said sum of Rs. 1,01,302-14-10 might not any way be injured; and that the defendants might pay the costs of the present suit.

Both the defendants in their written statements admitted the assignment, but sought to justify it on the ground of necessity. They stated the circumstances under which the defendant Khantamani had left the family dwelling-house, and under which the two deeds of assignment were executed. The defendant Khantamani alleged, that at the time of the assignment, she was, in consequence of the plaintiff's refusal to support her, wholly destitute, and she stated that, before leaving the family dwelling-house, by the fraud and mis-representation of the plaintiff and Nilmani Chunder, she had, in consideration of a sum of Rs. 10,000, which they then paid her, been induced to release to them all her interest in the joint estate, and that the defendant Hiralal Seal had subsequently advanced funds by aid of which she had got this release set aside. In conclusion, she submitted that the validity of her assignment to the defendant Hiralal Seal, ought not to be questioned in the present suit, and that the suit ought to be dismissed with costs.

The defendant Hiralal Seal, in his written statement, stated

that he would not have made any advances to the defendant Khantamani, or have aided her in prosecuting her suit on any other terms than those contained in the assignment, which terms, he submitted, considering the risk under taken by him, were fair and equitable. He also stated that the plaintiff became aware of the assignment at or before the hearing of the defendant Khantamani's suit, but that, until the institution of the present suit, he took no steps to have the assignment set aside: he therefore submitted that the plaintiff's suit was barred by his laches.

The plaintiff, in his plaint and written statement, had charged the defendant Khantamani with having acquired habits unsuited to a Hindu widow, and with extravagance, profligacy, and debauchery. These charges were denied by Khantamani Dasi in her written statement, and the plaintiff abandoned them at the hearing.

Mr. Kennedy and *Mr. Branson* for the plaintiff.

Mr. Lowe and *Mr. Bonnerjee* for the defendant Khantamani Dasi.

Mr. Marindin and *Mr. Macrae* for the defendant Hiralal Seal.

Mr. Kennedy.—The only question is whether the assignment to Hiralal Seal can be upheld. In *Grose v. Amirtamayi Dasi* (1), which in no way differed from the present case, a similar assignment was declared void. It is an illegal trafficking in suits.

Mr. Marindin.—*Grose v. Amirtamayi Dasi* (1) is distinguishable. The validity of the assignment in that case was disputed by a stranger to the suit, but here the plaintiff is the man whose own wrong-doing was the cause of this litigation; there the parties were utterly ignorant as to what would be the out-turn of the accounts, here there was not the same element of uncertainty, the value of the property in dispute was known.

(1) 4 B. L. R., O. C., 1.

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The question between Khantamani and the reversioner are these :—(1) Was it necessary for her to borrow money for her maintenance and for the purpose of carrying on her suit? (2) Was she entitled to pledge her husband's property in order to procure the money? and (3) Could she have obtained the money on more reasonable terms? The security was precarious. If she could not have obtained money on better terms, the suit is not maintainable. The ground of decision in *Grose v. Amirtamayi Dasi* (1) was not that trafficking in suits is illegal, on the contrary it is a distinct authority that the Court will not dismiss a suit merely because it offends against the English law relating to champerty. The real ground was that the transaction was a gambling one, and unconscionable, and as such against public policy, but, on the latter ground, the plaintiff's conduct is more to be condemned than *Hiralal Seal's*. A Hindu widow is entitled to pledge the whole of her husband's estate for her maintenance, and where she has done so, as between the reversioner and the person who advances money to her, the latter is entitled to have the *corpus* of the property charged for repayment though as between the widow and the reversioner, the charge might be considered as limited to the interest only. But, however that may be, there are other issues raised by the pleadings: First, this is *res judicata*—*Biswanath Chunder v. Khantamani Dasi* (2). Secondly, if the plaintiff seeks to set aside the deed of assignment on the ground that it is champertous, he is clearly barred by the law of limitation—*Biswanath Chunder v. Khantamani Dasi* (3). The whole cause of action arose when the deed was executed; the reversioner could have sued to set aside the deed, immediately upon its execution, and his right must be exercised within six years from the time when his cause of action accrued. Thirdly, even supposing that the suit is not barred by the strict law of limitation, the plaintiff is barred by his laches.

Mr. Lowe.—The plaintiff has brought charges of gross immorality against Khantamani which were totally unfounded,

(1) 4 B. L. R., O. C., 1.

(3) 7 B. L. R., 131.

(2) 6 B. L. R., 747; and 7 B. L. R., 131.

and which he has abandoned at the last moment, he ought therefore to pay her costs. We have been declared entitled to the whole of the money in Court, and it would be inequitable to allow the plaintiff to reap any benefit by the setting aside of this deed, the necessity of which was caused by his own wrong.

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Mr. *Marindin* proposed to call witnesses to show that the terms of the agreement were usual, fair, and reasonable, but his Lordship refused to receive this evidence.

Mr. *Kennedy* in reply.

MACPHERSON, J.—The deeds of December 24th, 1864, and September 20th, 1865, executed by Khantamani Dasi are in their nature and effect similar to the deeds executed by Bamasundari Dasi which were the subject of discussion in the suit of *Amirtamayī Dasi v. Grose* (1) and the facts now before me are so similar in every respect to those in that case, that I have no doubt that it is my duty now to make a decree following in principle the decree in *Amirtamayī Dasi's Case* (1) as closely as possible. Like Bamasundari, Khantamani has assigned away absolutely the whole of her husband's estate to Hiralal seal, to be held by him as to one-half for his own use and benefit, and as to the other half to secure the repayment to him of all advances made by him to Khantamani, and to make over the balance (left after repaying these advances) to Khantamani Dasi. It was decided in *Amirtamayī's Case* (1) that such an assignment is not binding on the reversionary heirs of the husband, except as regards the charge on a moiety of the estate for moneys advanced, and that the having made such an assignment, placing the whole of her husband's estate absolutely in the hands of another, whom she constituted her irrevocable attorney and to whom she gave one-half absolutely, is an act of waste entitling the reversioner to demand the interference and protection of the Court.

There are two points in which the plaintiffs position differs from that which *Amirtamayī Dasi* occupied. The one is that the

(1) Reported on appeal under the name of *Grose v. Amirtamayī Dasi* 4 B. L. R., O. J., 1.

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plaintiff, who now seeks relief as reversioner, is the person who, by his conduct, rendered necessary the litigation which led to the assignment to Hiralal Seal; the other is that the money of which the estate of Khantamani's deceased husband consists has been already paid out of Court to her.

As to the first point I am of opinion that in this suit I can only deal with the plaintiff in his character of reversioner, and that his position as such is not altered by the fact that he resisted the plaintiff's attempt to recover that, which the Courts have now found her to be entitled to. It is to be borne in mind that, suing as he does as the next reversionary heir of Khantamani's deceased husband, he sues less for his own personal benefit than for the protection of the estate; for, in the not-improbable event of the plaintiff dying before Khantamani, he will derive no benefit himself from the present suit, which will in truth benefit those only who, on the death of Khantamani, happen to be the nearest heirs alive of her deceased husband. I think I am bound to treat the plaintiff merely as the nearest reversioner, and as if he had not been the chief defendant in Khantamani's suit.

As regards the money having already been paid out of Court, it seems to me that, as to one moiety of it, the defendants Khantamani Dasi and Hiralal Seal should be ordered to pay it back into Court. I have no doubt of the reversioner's right to secure the moiety assigned by the widow to Hiralal Seal absolutely, the assignment being an act of distinct waste as against the reversioner which the widow still upholds. As regards the other moiety I have more doubt as to the course which, under the circumstances, ought to be adopted. On the whole I think I ought not to order it to be brought into Court, especially as it has been actually paid out since this suit was instituted, and notwithstanding that the plaintiff applied for an injunction to restrain its being taken out. As to this moiety Khantamani committed no act of waste in charging it as she did with the advances made to her: and this being so, I do not think I should be justified in ordering the money to be brought into Court again.

On the general question as to the pressing necessity under which Khantamani lay to enter into the arrangement which

she made with Hiralal Seal, Mr. Marindin proposed to call witnesses to prove that the terms agreed upon are not unusual, and that they were, in the opinion of the witnesses, fair and reasonable ; but I refused to receive such evidence. I do not doubt that such agreements are constantly made ; but the fact that suit brokers, and those who traffic in litigation, think such agreements fair and reasonable really does not touch the matter which I have to decide. There is one element in which the agreement entered into by Khantamani differs from that entered into by Bamasundari, namely, that, before Khantamani Dasi made her agreement with Hiralal Seal, Bamasundari's suit had progressed with such success, that there was no doubt about the rights of Khantamani, as the widow of one of the sons of Ramtann Chunder, being very valuable. The release which she had executed was the only obstacle between her and the establishment of those rights, and the release was not practically much of a difficulty. When she left the family dwelling-house at Behala, she went to live with Bamasundari ; and, doubtless, she made the assignment to Hiralal Seal pretty much as a matter of course, and partly because Bamasundari had already dealt in like manner with her (Bamasundari's) interest.

The decree will declare that the deeds of December 24th. 1864, and September 20th, 1865, so far as they relate to the eight-anna share of the property therein mentioned, which purports to have been assigned to Hiralal Seal and his assigns, upon the terms that he or they should and might retain the same for his or their own absolute use and benefit; is not binding upon the plaintiff, or upon the person or persons who, upon the death of the said Khantamani Dasi or other determination of her estate, may be entitled to inherit the property of the late Gakul Chandra Chunder deceased as his heir ; that no force or effect ought to be given to that deed as against the plaintiff, or other such heirs as aforesaid, so far as relates to the said eight-anna share ; and that Rs. 50,651 (being an eight-anna share of the sum of Rs. 1,01,802 paid out of Court to Khantamani Dasi, or to Hiralal Seal as her attorney, under the order of this Court, dated the 9th of March 1871, and representing the share of the said estate purporting to have been assigned absolutely to Hiralal

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Seal and his assigns) be forthwith brought into Court by Khantamani Dasi (or by Hiralal Seal, so far as the said sum or any portion thereof shall have come to his hands) and be retained there as a security for the rights and interest of the person and persons who, upon the death of Khantamani Dasi or other determination of her estate, may be entitled to inherit the property of the late Gakul Chandra Chunder as his heirs, and subject to the further order of the Court. The decree will further declare that the deeds of assignment are of no force or effect as against the plaintiff, or other such heirs as aforesaid, so far as the said deeds relate to the other eight-anna share of the said sum of Rs. 1,01,302, save as creating a charge on the said last mentioned share for the advances (whether by way of maintenance or otherwise) and expenses charged thereon by the said deeds, with interest thereon at 12 per cent. per annum.

The plaintiff is not entitled to his costs of this suit. He has not succeeded in establishing his right to the whole of the relief which he sought; but, even if he had succeeded more entirely, I should not have allowed him his costs, in consequence of the charges of misconduct, profligacy, and debauchery, which, in the 13th and 15th paragraphs of his plaint, he has chosen to make against Khantamani Dasi, who is the widow of his brother. There is no evidence whatever to support these charges (which at the hearing were abandoned and withdrawn); but as they appear in the plaint, and as no attempt was made to support them in cross-examining Khantamani when she was examined under commission, I shall allow the plaintiff no costs.

The plaint seeks no relief except as regards the sum of Rs. 1,01,302 which has been paid out of Court. I have therefore considered the plaintiff's case with reference to that sum only.

Attorney for the plaintiff : Messrs. *Rogers and Remfrey*.

Attorneys for the defendant Khantamani Dasi : Messrs. *Gray and Sen*.

Attorneys for the defendant Hiralal Seal : Baboo *P. C. Mookerjee*.

[APPELLATE CIVIL.]

Before Mr. Justice Kemp and Mr. Justice Glover.

**BAIKANTHA NATH SING AND OTHERS (PLAINTIFFS) v. MAHARAJA
DHIRAJ MAHATAB CHAND BAHADUR, ZEMINDAR, AND OTHERS
(DEFENDANTS-)***

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March 8.

*Patni Estate, Sale of, for Arrears of Rent—Reg. VIII of 1819: s. 8, cl. 2,
Effect of Non-compliance with the Provisions of—Suit to set aside the Sale.*

I. L. R.
1 Cal 175.
& 360
and
2 Cal 314.

It is essential to the validity of a sale held under Regulation VIII of 1819, of a patni estate for arrears of rent, that the notices of sale described in cl. 2, s. 8 of the Regulation should have been all duly and regularly published as therein directed.

THE plaintiffs held a patni talook named Ichapore, under the Maharaja of Burdwan, which stood in the name of their grandfather in the Maharaja's *taujih* (revenue or rent account showing under the name of each payer of revenue or rent, the total amount due, the amount paid, and the balance due.) The Maharaja of Burdwan instituted a suit for arrears of rent due on account of this patni mehal for the year 1276 B. S. (1869-70), in the Collector's Court at Hooghly, under Regulation VIII of 1819; and on the 14th May 1870, the patni estate was sold for such arrears, and purchased by Ram Kumar Mitter and Dwarkanath Banerjee, defendants. The plaintiffs objected to the sale before the Collector, but unsuccessfully. The present suit was brought by them in the Civil Court against the Maharaja and the auction-purchasers for a declaration that the sale was illegal, on the grounds that the notices of sale, as described in Regulation VIII of 1819, had not been duly published; that the plaintiffs were wholly ignorant of the proceedings; and that the property had been sold for a price considerably below its proper value; and also for possession. The plaintiffs alleged that the

* Special Appeal, No. 576 of 1871, from a decree of the Judge of Hooghly, dated the 24th February 1871, reversing a decree of the Second Subordinate Judge of that district, dated the 22nd September 1870.

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Maharaja's agents had acted fraudulently in the publication of the notices. They also claimed damages.

The defence of the Maharaja was that the notices of sale had been duly published, and that there was no fraud on the part of his agents.

The defence of the auction-purchasers was the same as that of the Maharaja, with the addition that, as they were *bonâ fide* purchasers for a valuable consideration, the sale to them was not liable to be disturbed.

The Subordinate Judge held that the receipt of service of notice filed was a forgery, and that no notices had been proved to have been given in the mode prescribed in Regulation VIII of 1819. He gave the plaintiffs a decree for possession, but without damages, which he held they were not entitled to, as they were defaulters in the payment of their rent. Against this decision the purchasers appealed to the District Judge. The Judge concurred with the lower Court in its finding that the receipt of service of notice was not genuine. He came to the conclusion however that the evidence established a personal knowledge of the notice of sale by the plaintiffs. He also held that, though the notices might not have been properly published at the places, and in the manner prescribed in Regulation VIII of 1819, that was not sufficient in subsequent proceedings to reverse a sale, as he found that the plaintiffs had personal knowledge of the day of sale; and he held that the object of the law was fulfilled, and dismissed the plaintiffs' suit.

Mr. Woodroffe (with him Baboos Kali Mohan Das, Hem Chandra Banerjee, and Ram Charan Mitter) for the appellants.

Baboos Jagadnand Mookerjee and Chandra Madhab Ghose for the Maharaja of Burdwan.

Mr. Money (with him Baboos Ramanath Bose and Tarak Nath Sen) for the auction-purchasers.

Mr. Woodroffe.—For a sale of a patni estate on account of arrears of rent to be valid, it is necessary that all the provisions of Regulation VIII of 1819 should have been strictly carried out. Cl. 2 of s. 8 requires three separate notices to be given, one to

be put up in some conspicuous part of the Collector's cutcherry another to be stuck up at the sudder cutcherry of the zemindar himself, and a third to be published at the cutcherry or at the principal town or village upon the land of the defaulter. The law further says that the zemindar shall be exclusively responsible for the due service of these notices. These three distinct notices are imperative, and the reason is plain, for a patnaisale affects not simply the patnidars, but all holders of subordinate tenures under the patnidars. In *Mohammed Zahor Ali Khan v. Mussamut Thakoranes Ruttee Koer* (1), the Privy Council held that a special law must be strictly carried out. A series of decisions of both the late Sudder and the High Court held a strict compliance with this section of Regulation VIII of 1819 to be indispensable to the validity of a sale under this Regulation. See *Sona Bibi v. Lal Chand Chowdhry* (2), *Haranath Gupta v. Jagannath Roy* (3) *Raghab Chandra*

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(1) 11 Moo. I. A., see p. 477.

(2) 9 W. R., 242.

(3) Before Mr. Justice Bayley and Mr. Justice Hobhouse.

HARANATH GUPTA (ONE OF THE DEFENDANTS) v. JAGANNATH ROY CHOWDHRY AND OTHERS (PLAINTIFFS)*.

The 1st February 1869.

Baboo Ananda Chandra Ghosal for the appellant.

Baboo Ashutosh Chatterjee Jagadannand Mookerjee, and Anukul Chandra Mookerjee for the respondents.

BAYLEY, J.—I am of opinion that this appeal must be dismissed with costs.

The plaintiffs, Jagannath Roy and Brajendra Kumar Roy, held a patni under a minor zemindar, Annada Prasad Roy, whose estate is now under the Court of Wards, and who is a co-defendant with the special appellant in this case.

This patni was sold for arrears of rent on the 14th May 1866, and purchased by one Haranath Gupta. The plaintiffs sued for possession of the tenure by having the sale at auction set aside.

The plaintiffs' case was that the sale was entirely illegal and fraudulent; that no notice was served as required by cl. 2, s. 8, Regulation VIII of 1819; and that the purchaser, Haranath Gupta, was a servant of the zemindar, and a mere *benamidar*.

The defendants pleaded that the sale was good and legal, and should be upheld.

The first Court held that the notice was duly served, and that the plaintiffs were fully aware of the impending sale. It therefore dismissed the plaintiffs' case.

The plaintiffs appealed to the lower Appellate Court, and urged that, in fact, no legal notice was ever served upon them.

I. L. R.
1 Cal. 176.

* Special Appeal, No. 2020 of 1868, from a decree of the Principal Sudder Ameen of Tippera, dated 19th May 1868, reversing a decree of the Meonsiff of that district, dated 31st August 1867.

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Banerjee v. Brajanath Kundu (1). and Lootf-o-nissa Begum v Kowur Ram Chunder (2) decided by the late Sudder Court.

The lower Appellate Court reversed the decrees of the first Court, and ordered the sale to be set aside on the ground of the notice not having been duly served.

The defendant, Haranath Gupta, is the special appellant before us, and the zemindar also appears in support of the special appeal, but has filed no petition under s. 373, Act VIII of 1859.

The grounds taken in the petition of special appeal are, *firstly*, that the purchaser has wrongly had put on him the burthen of proving that all the formalities necessary to be observed before a sale of this nature had been fulfilled; *secondly*, that supposing there was any irregularity in the notice, that irregularity could not affect the *status* of the defendant (the purchaser); *thirdly*, that the plaintiff was bound to prove his allegation of there being fraud and collusion between the zemindar and the auction-purchaser; *fourthly*, that as long as the plaintiffs did not show that no balance was due, no irregularity in regard to the notice could vitiate the sale; and *lastly* that by the evidence adduced by the defendant purchaser, it had been clearly shown that the notice was duly served, and that the Principal Sudder Ameen was wrong to order the sale to be set aside on the only ground that "the notice was not served 15 days before the sale."

The decision of the lower Appellate Court is, no doubt, very unconnected and obscure; but taking it as a whole, and looking to the judgment with reference to the pleadings and the evidence before the lower Appellate Court, I think that it substantially finds that notice under cl. 2, s. 8, Reg. VIII of 1819, was not duly served, and therefore, in the terms of that law, the tenure could not be properly brought to sale for its arrears of rent.

In the first place, I think that the lower Appellate Court disbelieves the evidence of the peon as to the service of notice, and it does so because the peon deposed to the notice being served in Baisakh, whereas some witnesses who came forward to support the peon's evidence stated that the notice was served in Chaitra.

The defendant purchaser filed a *sirathdi* (report of the facts of a transaction) purporting to have been given by certain persons of the village on the 13th Baisakh, but the witnesses to the *sirathdi* on being examined generally denied that there had been any such *sirathdi* at all. The lower Appellate Court, upon these two (as it finds) untrustworthy and irreconcilable statements, comes, I think, to a general conclusion of facts (though it is true after a good deal of loose and rambling argument), that really neither the notice, nor the *sirathdi* is proved, and that there was no evidence whatever of any notice of sale within 15 days from the 1st Baisakh as required by cl. 2, s. 8, Regulation VIII of 1819.

It has been pressed on us that a notice under cl. 2, s. 8, Regulation VIII of 1819, is not an essential part of the preliminaries required by the former portion of the section as far as regards the validity of a sale, and the case of *Sona Bibee v. Lall Chand Chowdhry* (a) has been cited in support of this argument.

In my opinion, looking to the terms of s. 8, it is impossible to say that it was not a distinct and an obvious object of the Legislature to provide a sufficient notice to a defaulter, before a sale took place of his tenure; and I think that the law considered 15 days' time (but not

(1) Post 91.

(2) S. D. D. for 1849, 371.

Mr. Money.—Technical objections ought not to be allowed to defeat the object of the Regulation. See *Sona Bibi v.*

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less) to be a sufficient period for giving such defendant notice of the intended sale, and that without such notice no sale could be a sale duly held under that law. Again, the decision of this Court cited above does not seem to me to apply to this case at all, because in that case it was found as a fact that the notice was duly served, and that the mere absence of a *shrauth* would not, under the circumstances, vitiate the sale; but here on my mind, the lower Appellate Court finds as a fact that no notice whatever was duly served. It is necessary to observe that the defendant himself filed the *shrauth* as evidence on his own behalf, and now comes and argues before us that the provisions of s. 8, Regulation VIII of 1818, are not required in their entirety (including the *shrauth*) to be carried out.

In regard to the objection in the petition of special appeal that no irregularity vitiates a sale, so long as the defendant does not show that there was any balance due, the pleader for the appellant does not press the point, and it is unnecessary therefore to make any further remark on it.

The special appeal is dismissed with costs.

HOSHOUS, J.—I agree in dismissing this appeal with costs.

The pleaders for the special appellant admit that, if we should hold that, as a matter of fact, the lower Appellate Court has found that notice was not served on the patnidar at any time, then they have no ground for special appeal, and the pleaders only took up the second point noticed by Mr. Justice Bayley, on the supposition that the Court might be with them on the first point. On considering carefully the judgment of the lower Appellate Court, I quite con-

cur with Mr. Justice Bayley that the Court has substantially found that there was no proof of any notice at all having been served upon the plaintiffs, the patnidars.

This being so, the first objection taken in appeal on behalf of the special appellant falls to the ground, and on the second point the objection falls of itself.

(1) *Before Mr. Justice Loch and Mr. Justice Mitter.*

RAGHAB CHANDRA BANERJEE
AND OTHERS (PLAINTIFFS) v. BRAJA-
NATH KUNDU CHOWDHREY AND
OTHERS (DEPENDANTS).*

The 2nd December 1870.

Baboo Hem Chandra Banerjee, Bipradas Mookerjee, and Iswar Chandra Chuckerbutty for the appellants.

Baboo Kali Prasanna Dutt, Mohini Mohin Roy, and Aubinash Chandra Banerjee for the respondents.

The judgment of the Court was delivered by.

LOCK, J.—The present suit is for setting aside the sale of a patni and for the recovery of possession of the plaintiff's share in the said patni.

The objections taken by the plaintiff to the sale are that it has been informally made, and that the zemindar, when asking the Collector to bring the property to sale, should have recognized all the patnidars, and that the sale had been brought about by collusion between the zemindar and some of the co-sharers of the patni.

The lower Court have found that the sale was properly conducted by the zemindar, and there was no proof whatever of the collusion, and so dismissed the suit.

* Special Appeal, No. 1260 of 1870, from a decree of the Subordinate Judge of Nuddea, dated the 30th March 1870, affirming a decree of the Sudder Moonsiff of that district, dated the 31st December 1868.

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Lal Chand Chowdhry (1). There can be no objection to the personal service on which the Judge has acted, as it is found that

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A special appeal has been preferred on the grounds—

First.—That the zemindar, when applying to the Collector for the sale of the patni tenure, was bound to recognise all the co-sharers of the patni; and,

Secondly.—That the sale proclamation was not issued as prescribed by law, and therefore the sale should be reversed.

After disallowing the first point, the Court proceeded:—

On the second point we find that the law (cl. 2, s. 8, Regulation VIII of 1819) requires that "a copy or extract of such part of the notice as may apply to the individual case shall be by him (the zemindar) sent, to be similarly published at the outcherry, or at the principal town or village upon the land of the defaulter." By the words "similarly published" is meant that the notice is to be stuck up, as appears from the previous words of the section, in the outcherry, or if there be no outcherry, in the principal town or village upon the land of the defaulter. Then the law goes on to say that the notice is to be served by a single peon, who is to bring back the receipt of the defaulter, or of his manager, for the same; or if unable to procure this, he is to obtain the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot. And further the law prescribes that, in case the people of the village should object or refuse to sign their names in attestation, the peon shall go to the "outcherry of the nearest Moonsiff, or if there should be no Moonsiff, to the nearest thannah, and there make voluntary oath of the same having been duly published, certificate to which effect shall be signed and sealed by the said officers, and delivered to the peon."

Now, looking at the evidence which has been read to us, we think the lower Courts are wrong in holding that the notice was duly published. The evidence in support of the due publication of the notice is to the effect that the peon of the zemindar, who could neither read nor write, proceeded to the spot, found some people sitting together in the village, asked where the outcherry was; on being told that there was no outcherry, asked where was the gomasta; on being told that the gomasta was not in the village, he opened the notice given to him by the zemindar, and showed it to five or six people, who were sitting there, none of whom could read and write; and he then proceeded to the thannah and obtained from the head constable a certificate on the back of the said document, to the effect that he made such and such a statement of the publication of the notice. This is clearly not such a publication as the law requires. The notice should be stuck up in the outcherry, or if there be no outcherry in some conspicuous part of the principal village upon the land of the defaulter. It is evident from the evidence that the notice was not stuck up at all, and in fact the peon took it away with him, and had the certificate endorsed by the head constable. Now the object of the notice appears to be not merely to give information to parties wishing to purchase, but to give information to the defaulter that, unless the arrears be paid by a certain day, the property will be sold; and the defaulter might well plead that he has been endamaged from the want of the proper publication of the notice as required by law. We think, therefore, that the lower Courts are wrong in finding that the notification had been published according to law, and we think also that the sale is consequently illegal.

(1) 9 W. R., 242.

on a previous occasion the patnidars had personally received the notice of sale, and paid in the rent then due. The reason urged by the appellants for a strict compliance with the letter of the law regarding the notices of sale will not apply in the present case, as there are in this estate no other holders of subordinate tenures under the patnidar. The plaintiffs, after unsuccessfully attempting before the Revenue authorities to prove irregularities in the procedure adopted by the zemindar, are bound, when they come into the Civil Court to have the sale cancelled, not simply to show that the letter of the law has not been complied with, but that, in fact, they had no knowledge of the sale. It is not denied that there was an arrear due. The Judge was right in acting upon the fact, which he found on the evidence, viz., that the patnidars had personal knowledge of the day of sale. The real object of the law is notice to the patnidar. The auction-purchasers have paid their purchase-money in good faith, and it is not proved that they acted in collusion with the zemindar's agents. They are entitled, in the event of the sale being cancelled, to get back their purchase money with interest from the zemindar under the provisions of s. 14 of Regulation VIII of 1819.

The judgment of the Court was delivered by

KEMP, J.—The special appellant in this case, the plaintiff below, is the patnidar of a certain mehal called Ichapore. The defendants, special respondents, are the Maharaja of Burdwan, the zemindar, and the auction-purchasers.

The suit was to set aside a sale made at the instance of the zemindar, the Raja, of a patni talook belonging to the plaintiff. Damages were also claimed.

The first Court, the Subordinate Judge of Hooghly, Baboo Jagabandhu Banerjee, found that the receipt of service of

As, however, the auction-purchaser is entitled to recover their share in the does not press to be indemnified by a patni, refund of his purchase-money, we think The question of costs which the it sufficient to declare that the notice not plaintiffs will recover from the zemindar having been published as prescribed by will be determined by the Court below, law, the sale is not binding upon the and the auction-purchaser will recover plaintiffs in this case, and that they are his costs from the zemindar.

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notice which was filed on behalf of the zemindar, the Raja, was a forgery, and his decision on this point is not interfered with by the Judge on appeal. The Subordinate Judge further found that the requirements of cl. 2, s. 8 of Regulation VIII of 1819 had not been complied with in this case, inasmuch as no notice was stuck up in the cutcherry of the Collector and no copy or extract of the notice was published at the cutcherry, or principal town or village upon the land of the defaulter. He therefore reversed the sale. On the question of damages he found that the plaintiffs were clearly defaulters, and that it was gross neglect on their part that they did not enquire whether a suit under the Regulation was instituted against them within the prescribed time, and that they are bound to abide by the loss which has accrued to them in consequence of their own laches.

On appeal to the Judge by the zemindar, there being no cross-appeal by the patnidar on the question of damages, we find that the points raised in appeal are not the point upon which the Judge's decision turns, namely whether personal service on the patnidar was sufficient, but the grounds of appeal were directed against the finding of the first Court on the question of fact, namely, whether the receipt of service of notice was a forgery or not. There were other grounds of appeal, but there was no such ground that personal service on the talookdar was a sufficient compliance with the requirements of the law. Now, as already observed, the Judge concurs with the first Court in finding that the receipt filed on behalf of the zemindar is a forgery; he says:—"There is no reason to differ from the lower Court's rejection of this receipt, inasmuch as it is not attested in any way, and that part of the evidence which relates to the act of signature is not credible." The Judge goes on to state that, looking at all the probabilities of the case, he is of opinion that personal service on the patnidars has been proved, and he infers that the evidence as to personal service must be accepted, because the patnidars knew that they were in arrears, because they knew their legal obligations with respect to their rents and lastly with reference to the weakness of their excuses for not having tendered the arrear due before the 6th or 7th of Jaishta,

namely, that their mooktear at Midnapore said that the sale would not take place before the 10th of Jaishta. On these presumptions the Judge overrules the decision of the first Court and holds that the personal service having been proved, the object of the law has been fulfilled; that the defaulters had an opportunity of saving the estate, if so minded, and not having done so the sale must be upheld. The decision of the first Court was therefore reversed. The only question we have to decide in this appeal is whether the finding of the Judge, that the personal service on the patnidar was a sufficient service under the terms of cl. 2, s. 8, Regulation VIII of 1819, is correct. The clause enacts that istahars or notices of sale shall be stuck up in some conspicuous part of the cutcherry, that a similar notice shall be stuck up at the cutcherry of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent, to be similarly published at the cutcherry, or at the principal town or village upon the land of the defaulter. The clause then goes on to enact that the zemindar shall be exclusively answerable for the observance of the forms above prescribed. It further enacts that if it shall appear, from the tenor of the receipt or attestation of three substantial persons residing in the neighbourhood, that the notice has been published at any time previous to the 15th of the month of Baisakh, it shall be a sufficient warrant for the sale to proceed upon the day appointed. Now in this case it appears to us very clear, that the first requirement of this clause of the law, namely, that the notice of sale shall be stuck up on some conspicuous part of the cutcherry of the Collector, has not been carried out. It is admitted that the notice was not stuck up in the cutcherry, but that it was pasted into some book which, it is said, remains in charge of the sheristadar, and which is not accessible to the public without the permission of the sheristadar. It does not require much reasoning to see that that is not a compliance with the requirements of the law. We also think that the copy or extract of the notice, which requires to be stuck up at the cutcherry, or at the principal town or village upon the land of the defaulter, has not been so published as

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directed by law. The evidence of the two piadabs of the Raja, namely, Sheikh Amanat and Rahumu, *alias* Filu, in the case of Amanat, goes to show that they went to Daspore, and not to Ichapore, although the notice was directed to be served at Ichapore; and in the case of Rahumu, *alias* Filu, he deposes that he went to Daspore, and that he did not go to the Ichapore cutcherry; he also states that although he has seaved notices several times on this patnidar he never went to the cutcherry; he does not certainly say Ichapore cutcherry, but as he had already said that he did not go to Ichapore, it may be safely inferred, that he means that he never went to Ichapore cutcherry. The learned counsel for the appellants has called our attention to many decisions in which it has been ruled that the requirements of cl. 2, s. 8 of Regulation VIII of 1819, must be strictly carried out, and that the responsibility of carrying them out according to the letter of the law is with the zemindar. We think it sufficient to refer on this point to a decision of the late Sudder Court of the 28th August 1849—*Lootf-o-nissa Begum v. Kowur Ram Chunder* (1). That was a decision before three Judges, who were very competent to pass an opinion upon the construction to be put upon the Regulation. Those learned Judges held, that the duty of the zemindar under cl. 2, s. 8 of Regulation VIII of 1819, was an indispensable duty; that he is bound to serve notice on the defaulter, either at his cutcherry or at the principal town or village on the land of the defaulter; and they further give it as their opinion that the land of the patni in arrear is what is meant in the Regulation by the words "land of the defaulter." We therefore think it very clear that the requirements of the law have not been complied with in this case, and that the sale must be reversed. Mr. Money, who appears for the auction-purchaser, who has been made a party to this suit, has called our attention to s. 14 of Regulation VIII, more particularly to the latter portion of the section which enacts that "The purchaser shall be made a party in such suits and, upon decree passing for reversal of the sale, the Court shall be care-

(1) S. D. D. for 1849, p. 371.

ful to indemnify him against all loss at the charge of the zemindar or person at whose suit the sale may have been made."

We are informed that the purchase-money is still in the hands of the Collector. We therefore decree the special appeal, reverse the decision of the Judge, and restore that of the first Court. The plaintiff's costs of both Courts including the costs of this Court will be paid by the Raja with interest. The purchaser defendant will also be entitled to recover his costs from the Raja, including the costs of this Court, and the purchase-money will be refunded to him. The plaintiffs and the purchaser will recover separate costs from the Raja.

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DHIRAJ MA-
HATAB CHAND
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Appeal decreed.

Before Mr. Justice Kemp and Mr. Justice Glover.

MADAN MOHAN BISWAS AND ANOTHER (PLAINTIFFS) v. WILLIAM STALKART AND OTHERS (DEFENDANTS).*

1872
March 4.

Suit for Rent at enhanced Rates of Land situated in a Town—Act VIII of 1869 (B. C.)

A suit cannot be maintained under Act VIII of 1869 (B. C.) for rent at enhanced rates of land, not used for agricultural or horticultural purposes, but situated in a town.

Baboos Bhairab Chandra Banerjee and Bama Charan Bose for the appellants.

Baboo Rajendra Nath Bose for the respondents.

The facts of this case and the arguments are sufficiently stated in the judgment delivered by

KEMP, J.—This is a suit brought by the agent of Rani Lalan Mani upon a notice dated the 24th of Chaitra 1276 (5th April 1870), addressed to Messrs. John and William Stalkart of Sulkea. The notice was issued under the provisions of s. 13

* Special Appeal, No. 721 of 1871, from a decree of the Additional Judge of Hooghly, dated the 27th March 1871, affirming a decree of the Moonsiff of that district, dated the 28th December 1870.

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Act X of 1859, and is to this effect :—That in No. 12 *khas bazi-
afti bandobasti mehal*, Chur Sulkea, the defendants, the Messrs.
Stalkart, hold a tenure which is recorded as dags Nos. 2 and 3
in the settlement proceedings, and that the area as per *chitta* is 13
bigas odd katas; that on measurement it being found that
they have in their occupation 40 bigas of land; therefore there
is an excess of 27 bigas odd katas in their occupation: that
ryots of the same class, and holding lands of the same descrip-
tion, namely Messrs. Gregory and Mackenzie, pay a higher rent
than the rent paid by the Messrs. Stalkart; and that the produc-
tive power of the soil has increased. The notice therefore is
on this footing, that the defendants do, within seven days, ap-
pear and execute a *kabuliat* at the rate of Rs. 50 a biga.

The suit was instituted on the 11th August 1870; and when the
suit was instituted, Act VIII of 1869 (B. C.) was in operation in
the district which has jurisdiction over the suit, supposing it to be
brought in the proper shape. The suit was instituted in the
Court of the Moonsiff of Sulkea. The plaint states that the
proper yearly jumma payable on the whole area is Rs. 2,000;
that on the plaintiff's share the jumma would be Rs. 625 per
annum. The plaintiff does not sue for the increased rate after
notice for the whole year according to the terms of her notice, but
sues, perhaps by way of a feeler, for three months' rent, namely,
from Baisakh to Asar (April to June) for Rs. 156-4. The de-
fence of the Messrs. Stalkarts is a very elaborate and long one.
It is not necessary to go into all the points raised in the defence
on the merits of the case; it is sufficient for us to notice the points
taken with reference to this suit not being maintainable under
the provisions of Act X of 1859 under which the notice was
served, or under Act VIII of 1869 (B. C.) under which the
plaint was instituted.

The Moonsiff, in a very careful decision, notices only such of
the pleas in the defence as are necessary to enable him to arrive
at a decision as to whether he had jurisdiction to try the case
under Act VIII of 1869 (B. C.) The points taken are that the
land is situated in the heart of the town of Sulkea; that it never
has been used for agricultural or horticultural purposes, or for any
purposes incidental thereto, and, therefore, that the provisions of

Act X of 1859 and Act VIII of 1869 (B. C.) will not apply. With reference to that point, the Moonsiff, after referring to certain decisions of an old date which are to a certain extent in conflict with decisions of a later date, gives a number of decisions of this Court which rule that such a suit will not lie, and the Moonsiff says, and we think very properly says, that it would be in his opinion the safest course to follow the principles laid down in the later rulings. The Judge has substantially confirmed the ruling of the Moonsiff. He is also of opinion, without quoting any decisions at length, that the Moonsiff was right in holding that the later concurrent decisions of this Court supported the views taken by the Moonsiff.

In special appeal it is contended that the lower Courts are wrong in holding that Act X of 1859 and Act VIII of 1869 (B. C.) do not apply, and that the cases referred to by the lower Courts do not finally settle the question; that, however applicable these decisions may be to cases under Act X of 1859, they are not applicable to cases under the latter Act, namely, Act VIII of 1869 (B. C.) This case has been brought to enhance the rent of the defendant; and although notice was issued under s. 18 of Act X, the suit itself was instituted, as already observed, after Act VIII of 1869 (B. C.) came into operation in the district of Howrah; we have been referred to a Government Gazette which notifies that the said Act would come into operation in the district of Howrah on the 18th of August 1870; the suit was instituted on the 18th of August 1870, and therefore there can be no doubt that it is governed by the later Act, namely, Act VIII of 1869 (B. C.) The suit is brought under s. 18 of that Act, and the words of that section are, almost word for word, the same as those of s. 17 of the former Act. The grounds upon which the notice proceeds are, *1st*, that the productive powers of the land have increased; it does not say that they have increased otherwise than by the agency or at the expense of the ryot, or in what way they have increased; it merely says that they have increased; *2ndly*, that the quantity of land has been proved by measurement to be greater than the quantity for which rent has been previously paid. The question therefore is whether, under the rulings of this Court, such a suit can be brought

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under the provisions of that section. Speaking for myself I have repeatedly ruled, sitting with other learned Judges of this Court, that such a suit cannot be brought. It is admitted that the land occupied by the defendants is not used by them for agricultural or for horticultural purposes, or for any purposes incidental thereto. The land is used for a rope-yard, and it is not easy to understand how the productive powers of the land have been increased by the establishment of a rope-yard on that land; the land, apparently, from the statement of the defendants, is land which would be useless for agricultural purposes, as it is a strip of land on the border of the river, subject to tides, and only useful for such purposes as that for which it has been used by the defendants. However, that is a question which is involved on the merits of the case. There are many decisions of this Court which have ruled that lands used for other purposes than for purposes of agriculture and horticulture are not lands liable to enhancement under s. 17 of Act X of 1859. Amongst many other decisions it will be sufficient to quote two, *Kali Mohan Chatterjee v. Kali Krishna Roy Chowdhry* (1) by L. S. Jackson and Markby, JJ., and there is also a very late case, *Kani Durga Sundari Dasi v. Bibi Umdatunnissa* (2), before Glover and Dwarka Nath. Mitter, JJ., where this point was fully considered; and although those learned Judges differed, the Senior Judge, Glover, J., was of opinion that there was no conflict of decisions; and although pressed by his learned colleague to refer the question to a Full Bench, he declined to do so, inasmuch as there was no conflict of decisions, and in doing so he was justified by the practice of this Court, because when there is no conflict of decisions, the Full Bench have invariably refused to decide the points referred. We are told that there is a probability of the decision just alluded to being appealed against. If that is so, the point will be definitely settled; but, as the law at present stands, and with reference to the rulings of this Court, we think it right to follow the consistent decisions of a later date, and we therefore upheld the decisions of the Courts below, and dismiss the special appeal with costs.

(1) 2 B. L. R., App., 39.

(2) Next page.

GLOVER, J.—I retain the opinion expressed by me in the case of *Rani Durga Sundari Dasi v. Bibi Umdatannissa* (1).

I therefore concur in dismissing the appeal with costs.

Appeal dismissed.

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*Before Sir Richard Couch, Kt., Chief Justice, Mr. Justice Bayley, and
Mr. Justice Ainslie.*

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June 26.

**RANI DURGA SUNDARI DASÍ (PLAINTIFF) v. BIBI UMDATAN-
NISSA (DEFENDANT).***

*Suit for Enhancement of of Rent of Land covered with Buildings—Act X of
1859 s. 23, cl. 4—Jurisdiction of Revenue Court,*

A suit for enhancement of rent of land covered with buildings will not lie in the Revenue Court under cl. 4, s. 23 of Act X of 1859, but it is cognizable only by a Civil Court.

THE plaintiff in this case instituted her suit under cl. 4, s. 23 of Act X of 1859, for arrears of rent at enhanced rates of land situated in the Jessore bazar. The enhancement was claimed on the ground that the defendant paid a lower rate of rent than the rate paid by similar ryots for similar lands surrounding the disputed land. There was no mention in the plaint of buildings being situated on the land, or that the claim included any rent on account of such buildings, nor was any reference made thereto in the defence disclosed in the defendant's written statement.

The Deputy Collector, among other issues, fixed the following :

"The land being entirely occupied as building ground, will a suit for arrears of rent at an enhanced rate lie in the Revenue Court?"

On this issue the Deputy Collector observed :—"The question is, whether a suit under this section (2) will lie in the Revenue Court? It has been ruled, I believe, that all suits between landlord and tenant for rent of land can be heard in a Revenue Court, and there does not seem to be anything

* Appeal No. 1 of 1872 under Cl. 15 of the Letters Patent of 28th December 1865, from the decision of Glover, J. (differing from Mitter, J.), dated 22nd January 1872, in Special Appeal No. 723 of 1871, from a decree of the District Court of Jessore, dated 22nd March 1871.

(1) See next case.

(2) Cl. 4, s. 23 of Act X of 1859.

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in Act X of 1859 which would shut out suits of this nature however ill-adapted its provisions may be to their decision." The Deputy Collector gave the plaintiff a decree for rent at the rate of Rs. 64-2 per annum for the entire holding for the period in arrears, with interest at 12 per cent. per annum on the amount decreed.

Against this decision the defendant appealed to the District Judge, urging, among other grounds, that as the land for which rent was claimed at enhanced rates was not used for agricultural or horticultural purposes, no suit for rent in respect of it would lie in the Revenue Court.

The Judge, in dismissing the plaintiff's suit on the ground that the Revenue Court had no jurisdiction to try it, observed:—"I am of opinion that this suit should not have been brought under Act X of 1859. The High Court has on more than one occasion ruled that suits for rent of houses in a bazar cannot be entertained under the Act (X of 1859), and the ruling *Kali Mohan Chatterjee v. Kali Krishna Roy Chowdhry* (1) is, I think, conclusive on the point. I must, therefore, decree this appeal, and dismiss the suit with costs."

The plaintiff appealed to the High Court. The appeal was heard by Glover and Mitter, JJ.

GLOVER, J.—The question in this special appeal is, whether enhancement of rent can be had under Act X of 1859 on land situate in the middle of a town or bazar, and used entirely for building purposes? The Judge has held on the authority of *Kali Mohan Chatterjee v. Kali Krishna Roy Chowdhry* (1) that it cannot.

It is contended for the special appellant that the land was originally let as an ordinary ryoti tenure, and that the suit is for rent of the land and not for the rent of the houses. I do not know that this makes any difference, and no attempt has been made to distinguish between the two kinds of rent. I understand Act X of 1859 as referring to land in the state it is in when the suit is brought, and there have been many decisions of this Court to the effect that the provisions of the Act can

only apply to land which is at the time used for agricultural or horticultural purposes, and if land, originally leased out as an ordinary agricultural tenure, becomes afterwards covered with buildings in consequence of a town or bazar growing up round about it, I apprehend that, under the rulings of this Court, it loses its agricultural character, and cannot form the subject of an enhancement suit under the Rent Law.

The case of *Ram Churn Singh Khettree v. Meadhun Durjee* (1) is not contrary to this view. That was a suit for house-rent, and it was held that, where that rent included the ground rent, and the two could be clearly separated, a claim for the ground rent might be cognizable under Act X of 1859. But this opinion was given very doubtfully, the words used being "would perhaps be cognizable." The case of *Kali Kishen Biswas v. Sreemutee Jankee* (2) is very clear on the point. It rules that the occupation intended by Act X is occupation for agricultural or horticultural cultivation. The case of *Ranee Shurno Moyee v. Blumhardt* (3), which has been quoted by the special respondent's pleader, is not applicable, for there the land was leased expressly for building purposes, which is not shown to be the case in the suit now before us. But the case of *Kali Mehan Chatterjee v. Kali Krishna Roy Chowdhry* (4) is directly in point, and decides that Act X of 1859 does not apply to a suit for the enhancement of rent of land which is situated in the midst of lands used for building purposes, and on which the defendant's house is built; and *Khairudeen Ahmed v. Abdul Baki* (5) upholds a similar principle.

(1) 8 W. R., 90.

(2), 8 W. R., 250.

(3) 9 W. R., 553.

(4) 2 B. L. R., App., 39.

(5) *Before Mr. Justice Kemp and Mr. Justice Glover.*

KHAIRUDEEN AHMED AND OTHERS
(PLAINTIFFS) *v.* **ABDUL BAKI** (DEFENDANT).*

The 30th April 1869.

Mr. C. Gregory for the appellant.

Moonshee Mahomed Eusuff for the respondent.

GLOVER, J.—This was a suit for enhancement of rent after notice.

Both the plaintiff and defendant are co-sharers in the same village. In 1848, a batwara was effected, by which the defendant's dwelling house was included in the plaintiff's share of the village, and the Collector, under the provisions of s. 9, Regulation XIX of 1814;

* Special Appeal, No. 2973 of 1868, from a decree of the Additional Judge of Tirhoot, dated the 22nd July 1868, affirming a decree of the Assistant Collector of that district, dated the 1st October 1867.

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So does *Church v. Ramtanu Shaha* (1) as does also *Ramdhare Khan v. Haradhan Paramanick* (2). There is no doubt the

directed that this, together with seven bigas of adjacent land, should be retained by the defendant on his paying the plaintiff a yearly rent of three rupees a biga, and this arrangement was duly entered in the batwara paper. The plaintiff now seeks to enhance this rate of three rupees a biga up to six rupees, the usual rate, on this ground (amongst others) that the Regulation only refers to land immediately adjacent to a house and not to large fields which are moreover cultivated by the defendant as a ryot. The Assistant Collector thought that the plaintiff was entitled to enhance but gave no decree, holding that the Revenue Courts had no jurisdiction. The Judge, on appeal, thought that the case was cognizable by the Collector, but that the rate fixed by the Collector on the batwara proceedings was conclusive so far as the Revenue Courts were concerned.

The point taken in special appeal is that the batwara proceeding is no bar to enhancement; that the lands then given by the Collector did not come under the definition of s. 9 of the batwara law; and that, if they did, the utmost the Collector did, and could do, was to fix what was then an equitable rent, and that it did not follow that what was equitable then was equitable now.

For the special respondent, it was contended, that the Revenue Courts had no jurisdiction as had been found by both the lower Courts, and that there was no need to go into the question as to whether the batwara order was a final one or no.

It appears to me that this is a valid objection, so far as regards the want of jurisdiction. I do not, however, understand the Additional Judge to decide the case on this ground, for in one part of his decision he says, "the claim is entirely for ground-rent, and therefore within the cognizance of the Collector."

I take his meaning to be that although the Collector had jurisdiction, still the batwara proceeding must be assumed to have been correct, and to be a sort of bar to the plaintiff's claim to enhance. I admit, however, that there are some parts of his judgment which seem to mean that, as the land in suit was immediately attached to the defendant's house the rent fixed by the Collector, under s. 9, Regulation XIX of 1814, was in the nature of house-rent, and not recoverable under Act X of 1859. But, whatever his real meaning may be, I take it that there is no jurisdiction in the Revenue Courts to try a case like this. There can be no doubt (indeed the batwara papers show this very clearly) that the Collector gave the seven bigas of land to the defendant as an appendage to his dwelling-house which, appears to have comprised a considerable block of buildings, including a mosque. Whether or not the grant was excessive for the purpose is a question with which we have nothing to do now. It is enough that the Collector was authorized under the batwara law to give such land as he thought proper to consider "attached" to the defendant's homestead as an appurtenance to that homestead; and it seems to me, therefore, that the rent fixed on that land must be considered as the rent of the homestead—of the house and grounds as it would be called in England—and that such rent could not be the subject of a suit under Act X of 1859, the proper forum would be the Civil Court.

For these reasons, I think that this special appeal should be dismissed with costs.

KEMP, J.—I concur in this judgment. It appears to me that the land is imme-

(1) *Post*, 105.

(2) *Post*, 107.

case of *In re Bramamayi Bewa* (3), in which Mitter, J., held that there was nothing in Act X of 1859 to justify any distinction

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distally attached to the house of the defendant, special respondent, "forming as it were one compound or set of premises"—*Bipro Doss Dey v. Wollen* (a). The suit ought to have been brought in the Civil Court.

the plaintiff. The decree declared that "the appeal be decreed," but did not specifically declare that the defendant was to execute a kabuliati.

On special appeal against this decision, various grounds, were taken impugning the correctness of the Judge's conclusions; and after the argument had proceeded some length, a suggestion was thrown out that the whole decree must be inoperative, the suit being brought in a Court that had no jurisdiction to entertain it, inasmuch as the subject matter was rent of land situated within a town covered by buildings, and one to which, consequently, the provisions of Act X had no application whatever.

At first we entertained some doubt as to whether this objection, which had not been so much as thought of in either of the Courts below, ought to be allowed here. It appeared that both the parties had submitted to the jurisdiction of those Courts, and if there was no defect of jurisdiction on the face of the plaintiff and the decree, it might not be worth while to put the parties to the expense of a fresh litigation if the points of dispute could be finally settled by our decree. The argument was therefore allowed to proceed; but on going further into the case, it has become very manifest to me, and also, I think, to the pleaders on both sides, that the decree obtained by the plaintiff in the Court below, and any affirmance or modification of that decree which he might obtain from us, would be hereafter quite inoperative and infructuous. It seems quite clear that if, upon the declaration as to the rates of rent which he has obtained, he were now to sue this defendant for arrears of rent, at the rates so declared, before the Collector, he would be met by the plea that the Collector was not competent to try

(1) *Before Mr. Justice L. S. Jackson and Mr. Justice Markby.*

C. CHURCH (DEFENDANT) v. RAMTANU SHAHA AND OTHERS (PLAINTIFFS).*

The 28th May 1869.

Baboo Kally Mohan Das and Hem-Chunder Bannerjee for the appellant.

Baboo Chunder Madhab Ghose for the respondents.

JACKSON, J.—This was a suit in the Collector's Court to obtain a kabuliati from the defendant for rent, at an enhanced rate, in respect of some four bigas fifteen katas of land occupied by him in the town of Sulkea. The enhancement was claimed upon grounds drawn up, not precisely in conformity with s. 17, but in words nearly resembling that section of Act X of 1859. The defendant claimed to hold this land under a mukarrari patta confirming a tenure of very ancient date, and granted by the vendors of the plaintiff. The Deputy Collector disallowed the plaintiff's claim for enhancement, but on appeal the Zillah Judge, finding that there was a defect of authority in respect of one of the co-sharers by whom the patta was alleged to have been granted, held the patta to be invalid, declared the defendant liable to enhancement and declared further, that he was liable to pay rent at a rate specified, being an enhanced rate, but not the rate stated in

(a) 1 W. R., 323.

(3) *Post*, 100.

* Special Appeal, No. 3235 of 1868 from a decree of the Additional Judge of Hoogly, dated the 1st May 1867, reversing a decree of the Deputy Collector of that district, dated the 12th March 1866.

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between suits for arrears of rent on account of lands used for agricultural purposes and suits for arrears on account of land

the suit for rent in respect of this land, and his suit would therefore be at once dismissed; and if he sued in the Civil Court, where the suit, no doubt, would be properly cognizable, that Court would decline to recognize the validity of the Collector's declaration, or the declaration of the Judge on appeal from the Collector, in respect of the rent which the defendant was liable to pay. That being so, it seems to me that it would be quite a waste of the time of the Court, it would also be a misapplication of its powers, and further a great misleading of the plaintiff, if we were to apply any reasoning that might occur to us to the discussion of the correctness of the judgment, which, upon other grounds would be quite unsustainable. It being, therefore, admitted that this decision is clearly invalid for want of jurisdiction, I think our simple duty is (and we shall best serve the interests of the plaintiff by taking that course at once) to declare that the decision of the lower Court in this suit has been passed without jurisdiction; that it can have no legal effect; and that, consequently, it is unnecessary for us to go into the merits of the case or determine the question raised in this special appeal. This is perhaps a course not quite in accordance with the provisions of s. 350 of the Code of Civil Procedure, but it is one which we are quite competent to take under the provisions of cl. 15 of the Letters Patent.

We therefore declare this judgment to be ineffectual. We refuse to decide the questions raised upon the merits of the case, and we order that each party do pay his own costs.

MARKEE, J.—I am entirely of the same opinion. It seems to me that in all these cases, where an objection is made to the want of jurisdiction in the Courts below which is taken here for the

first time in special appeal, a certain amount of discretion must be left to the Court in dealing with that objection. Recently here we have taken on different occasions different courses. On one occasion, the parties came before us, after having discussed the matter fully in the two lower Courts, not complaining in any way that there had been a wrong decision on the law or the facts of the case, but merely asking us to set aside that decision which they had contested fully in the Court below. We refused to set it aside that decision or to interfere in any way. If it was invalid, no use could be made of it, and we refused to set aside on the sole ground that it was made without jurisdiction. But in another case, *Kali Mohan Chatterjee v. Kali Krishna Roy Chowdry (a)*, similar to which is the present case, certain questions were raised as to whether Act X of 1859 had been properly applied to a suit for assessment of rent, the question arising as to the assessment of rent on land used for building purposes. There, acting upon a view very similar to the one now taken we declined to go into the matter, and held that the Courts below had no jurisdiction. I think this is a case in which we ought to follow the latter course, because it appears to me that any opinion that we should give upon the law of the case any result that we should declare ought to be come to in this case, would be ineffectual for the parties and could not be relied upon by them. I do not think that courts of law should enter into a discussion and give decisions which are out of their jurisdiction, which is what we are asked to do in this case. This is a very different thing from refusing to set aside a decree solely on the ground that it was passed without jurisdiction, though I do not say that even this might not be done in some cases.

(a) 2 B. L. R., App., 39.

used for other purposes, but the decision, which was that of the Senior Judge, L. S. Jackson, J., was in accordance with the

(2) *Before Mr. Justice Markby and Mr. Justice Glover.*

RAMDHAN KHAN (PLAINTIFF) v. HARADHAN PARAMANICK AND OTHERS (DEFENDANTS).*

The 15th September 1869.

Baboo Ashutosh Chatterjee, Naba Kissen Mookerjee and Jadab Chandra Seal for the appellant.

Baboo Hem Chandra Banerjee and Amarnath Bose for the respondents.

MARKBY, J.—It seems that in this case the plaintiff brought a suit to recover a piece of land, 14 cubits long and 7 cubits wide, in possession of the defendants. He says that he bought the land on the 26th Aswin 1259 (10th October 1853), from two persons, named Madhu and Narain. He says, that as this jummai land paid rent to the zemindar, on the 26th Sraban 1259 (9th August 1853), he had his name registered, and obtained an amalnama; that he built a hut upon the land, and sublet it to his vendors, at a monthly rent of two annas, from Aghran 1261 to Aghran 1276 (16th November 1855 to 15th November 1868); that the hut was burnt down; that he was going to build another upon the land, when he was opposed by the defendants who are the heirs of Madhu and Narain.

The defendants, in their written statement, admit the purchase of the plaintiff from Madhu and Narain; and they do not dispute the tenure which the plaintiff holds, but they deny that the plaintiff built the hut. They say they built the hut, having taken the land which they hold for dwelling purposes at an annual rent of four annas, and, as a proposition of law, they say that the plaintiff's title is barred under the

general law of limitation, and also that the plaintiff cannot obtain khas possession because they have been in possession twelve years.

Now, nothing seems to have turned upon the defence of general limitation. It is quite obvious upon this, that the defendants have put themselves out of Court, because they admit the tenure between themselves and the plaintiff.

The first Court found that the allegations generally of the plaintiff were true, and gave him a decree. The second Court finds, generally, that the allegations of the defendants are true,—that is to say, it finds that the defendants built the hut, that they held upon the terms they allege, and it finds that the allegation of the plaintiff that the land was demised for a specified term is untrue; and then the Court, observing that the defendants are “the ryots” of the plaintiff, dismissed the plaintiff's claim.

Now in special appeal before us, it has been contended by the plaintiff in the first place that the only right to remain in possession, which the defendants can claim, is under s. 6, Act X of 1859, and that s. 6 does not apply, because the tenants are persons to whom the land is sub-let by a ryot. I think that contention is bad in law. S. 6 does not exclude from the acquisition of the right of occupancy those persons who hold from ryots, but only those persons who hold from ryots themselves having no right of occupancy. Now, here the plaintiffs, assuming them to be properly described as ryots clearly by their own statement had more than a right of occupancy, for they claimed to have a transferable tenure. But, then, it is further objected by the plaintiff (still arguing that the only way in which the defendants can gain a right of occupancy is under Act X.) that

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* Special Appeal, No. 1501 of 1869, from a decree of the Subordinate Judge of Hooghly, dated the 26th May 1869, reversing a decree of the Moonsiff of that district, dated the 3rd April 1869.

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rulings I have already quoted. It seems to me, therefore, that we ought in this case to follow the long current of decisions

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Act X has no application to this case at all, because, by the defendants' own showing, the land was taken for dwelling purposes; and, according to the decisions of this Court, Act X does not apply to land taken under such circumstances. That contention appears to me to be good. In numerous cases decided by this Court relating to various provisions of Act X, this Court has come to the conclusion upon the general frame of the Act, that, though not restricted in express terms to any species of land, it was not intended to apply to any land except land of which the main object was cultivation, and with regard to this very section, the same conclusion has been come to in the case which was referred to, *Kali Kishen Biswas v. Sreemutes Jankoo* (a). Phear, J., in delivering judgment says:—"The occupation intended to be protected by that section is occupation of land considered as the subject of agricultural and horticultural cultivation, and used for purposes incidental thereto, such as for the site of the homestead, the ryot or mali's dwelling-house, and so on. I do not think that it includes occupation the main object of which is the dwelling house itself, and where the cultivation of the soil, if any there be, is entirely subordinated to that." I think that decision is in accordance with the general view taken of this act, and for my part, I may say, I entirely concur with it.

But it has been contended by the pleader for the defendants, special respondents, that the plaintiff's suit ought to have been dismissed, because, whatever his cause of action may have been, if he properly stated it, he did not prove the cause of action laid in his plaint. Now, I think there is a little confusion as to what the plaintiff's cause of action really is. To my mind the cause of action in

this plaint (and this plaint would have been perfectly good if it had been confined to that statement alone), was that the land belonged to the plaintiff, and that he had a right to the present possession of it, and that when he went to demand possession from the defendants they refused to give it to him. It is true that the plaintiff does go on and state circumstances which have now been finally decided to be untrue; and, no, doubt, the fact of his having done so may very well be raised against him in dealing with the evidence in the case. I do not think it follows, however, that because a plaintiff states circumstances in his plaint which are untrue, and which are not material allegations that is to say which are allegations which might be struck out of the plaint and yet the plaint remain a good one, and fails to prove those allegations, that, therefore, the suit must necessarily be decided against him. It stands admitted in this case that this land was the land of the plaintiff. It stands admitted that they only title of the defendants was in consequence of a grant made to them of the land in order that they might use it for dwelling purposes; and it seems to me that until the defendants can show that that grant was in its origin intended to be a permanent one, or that by occupation under it they had acquired a permanent right of occupancy, they must fail. I have already given my reasons for saying that they have made out no claim to a right of occupancy under Act X, because that Act has no application to this case; and they only other ground upon which it was possible that they could claim a right of occupancy, was, to my mind, stated in so vague a manner as to make it almost impossible to deal with it. It was stated that if a man (altogether independently of Act X of 1839, and even assuming that that Act would not apply) grants, we will say, a house to another for an indefinite

(a) 8 W. R., 250.

which held that the rent of land used for building purposes cannot be enhanced by a suit under Act X of 1859.

We were much pressed to refer this case for the decision of a Full Bench; but as there has been so far as I can discover,

term, the tenant, merely by occupation of it under that grant acquires, on equitable principles (for that is what it comes to), a right of occupancy. I know of no such principle of law. If authority were needed, it seems to me that such a proposition of law was expressly repudiated by the decision of the Privy Council in a case reported in 11 Moore's Indian Appeals, towards the end of the volume (a). I do not at all say that a grant which was originally wholly indefinite in its terms may not be made perpetual by the subsequent conduct of the parties: but that is a matter of fact, and no facts have been shown in this case of that kind, nor has the Court been asked to infer it. What we have been asked to hold, and what we cannot hold to give the defendants what they ask, is, that simply by occupying under a grant for no specified period and by paying rent under it, a tenant acquires a right of occupancy. I think that right is entirely confined to the special cases in which the Legislature has granted it. Therefore, I think that the grounds, upon which the lower Appellate Court based its judgment in this case, have been shown to be wrong in point of law, nor have the counter-objections in support of that judgment succeeded. The result to my mind is that the decree of the lower Appellate Court ought to be reversed, and that the plaintiff should have a decree for what the first Court gave him, that is to say, a decree for possession of the land. The defendants will have to pay the costs of this Court and of the lower Appellate Court.

Glover, J.—I am of the same opinion, and have nothing to add to the observations which have been made by Mr. Justice Markby.

(a) *Baboo Dhunput Singh v. Gromin Singh*, 11 Moo. I. A., 433, see p. 465.

(3) *Before Mr. Justice L. S. Jackson and Mr. Justice Mitter.*

In re BRAMAMAYIBEWA) PETITIONER)

The 24th August 1870

Baboo Kasikan Sein for the Petitioner.

JACKSON, J.—This is an application to quash the decision of the Small Cause Court on the ground that the subject is one not within the jurisdiction of such Court.

The suit was one for arrears of rent upon a small piece of land at Kalighat, on part of which is a house. It is contended that this falls within the meaning of cl. 4, s. 23, Act X of 1859, and that it was, therefore, a claim in respect of which at the time of the passing of the Mofussil Small Cause Court Act (XI of 1865), a suit might be brought before a Revenue Court.

Another ground on which we are asked to interfere is that the suit was improperly framed, the plaintiff being one of several co-sharers.

As to the first ground, speaking for myself, I have frequently held that the provisions of Act X of 1859 do not apply to suits of that description, the land being occupied for the purposes of building, and not agriculturally or in the neighbourhood of lands occupied agriculturally. I have repeatedly decided cases in appeal upon that principle. Even if the point was one which admitted of doubt, whatever course I should be inclined to take if the case arose in special appeal or in appeal regularly, I do not think it is a point on which the decision of the Court below ought to be called in question by way of exercising the extraordinary powers of this Court, and quashing a judgment regularly arrived at. I do not think, therefore, that this rule ought to be granted.

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no conflict of decisions on the point, I do not think that we can do so.

The decision of the lower Appellate Court appears to me correct, and I would dismiss this special appeal with costs.

My attention has been drawn to the case of *Tarinsy Persad Ghose v. The Bengal Indigo Co.* (1), but with all respect for the opinion of my learned colleague, I cannot think that this

As to the second point raised, it is a point of form which does not affect the decision on the merits.

MITTER, J.—I am of opinion that this suit was not cognizable by the Small Cause Court of Sealdah. The plaint shows clearly and distinctly that the subject of the case is a piece of land, and that the rent sued for is rent issuing out of that land, and payable on account and for the use of it. That there are certain buildings standing on the land does not, in my opinion, make any difference. Those buildings have been erected by the defendant, and it is quite clear from the plaint itself that they were not included in the lease, nor is the rent claimed on account thereof.

This being so, the question arises whether this suit could have been instituted in the Revenue Courts under the provisions of cl. 4, s. 23, Act X of 1859, if those Courts had been in existence on the date when the plaint was filed.

I am of opinion that the Revenue Courts alone could have entertained a suit of this description. The words of cl. 4, appear to me to be quite clear and positive on the point. That clause says: "All suits for arrears of rent due on account of land either khiraj or lakhiraj, or on account of any rights of pasturage, forest-rights, fisheries, or the like," shall be brought in the Revenue Courts and in none other. It is impossible to say that this suit is not a suit for arrears of rent on account of land, and therefore the Small Cause Court of Sealdah had no jurisdiction to try it, the jurisdiction of Small Cause Courts in

respect of such suits being barred by the express provisions of cl. 4, s. 6, Act XI of 1865.

I am aware that there are some decisions of this Court opposed to my view, but there are also several decisions the other way, and if the decision of this case had rested with me, I would have referred the question to a Full Bench of this Court for an authoritative ruling.

Whether the defendant in this case is a "ryot" within the meaning of that word as used in Act X of 1859, is a question upon which I do not wish to express any opinion, but it is quite clear that under the provisions of cl. 4, s. 23 of that Act, this suit being a suit for arrears of rent on account of land, could have been brought in the Revenue Courts only if those Courts had been in existence at the date when the plaint was filed. I see nothing in the Act to justify any distinction between suits for arrears of rent on account of lands used for agricultural purposes and suits for arrears of rent on account of lands used for other purposes. It has been already held by the Privy Council that a suit for arrears of rent against a tenant who is not a cultivating ryot was cognizable by the Revenue Courts (a).

I concur in the view which my learned colleague has taken on the second point raised in this application.

(a) *Baboo Dhunput Singh v. Gooman Singh*, 11 Moo. I, A. 433.

(1) 2 W. R., Act X R., 9.

is a case, in point, but if it be, there can be no doubt that a contrary ruling has been laid down in all the later decisions.

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METTER, J.— I am extremely sorry to differ from my learned colleague.

This was a suit for arrears of rent at enhanced rates, the arrears being alleged to be due on account of a piece of land situated in the Jessore Bazar. The lower Appellate Court being under the impression that the suit was one for house-rent, has dismissed it upon the ground that the Revenue Court in which it was instituted had no jurisdiction to try it. I am of opinion that the decision of the lower Appellate Court is erroneous in law, and ought therefore to be set aside. That the suit is not one for house-rent does not appear to be disputed. It is true that there is a building upon the land in question, but the building, it is admitted on both sides, is the property of the defendant; nor is it for any rent alleged to be due on account of that building that the suit was brought. The case therefore falls within the express provisions of cl. 4, s. 23, Act X of 1859, which was the law in force at the time of its institution, and which says: "All suits for arrears of rent due on account of land, khiraji or lakhiraj, shall be cognizable by the Collector of the land revenue, and shall not be cognizable by any other Court." The present suit is, as I have explained above, a suit for arrears of rent due "on account of land." That the land is occupied by a building appears to me to be of no consequence whatever. It is, nevertheless, "land," exactly in the same sense, as it would have been if it had been cultivated with indigo or paddy: and as the rent claimed is alleged to have issued from the land, and not from the building which stands upon it, I am unable to see how it can be held that the suit was brought in a wrong Court, when the Legislature says in so many terms, that all suits for arrears of rent due on account of land shall be brought in the Collector's Court and in no other. No portion of the rent sued for is, or is even alleged to be, due on account of the building; for that building is, as I have already shown, the property of the defendant, and as such not subject to the payment of any rent to the plaintiff. Nor can the fact

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that the arrears sued for are claimed at enhanced rates affect the character of the suit in any way whatever. It is to all intents and purposes a suit for arrears of rent as it is in name ; and as it is also a suit for arrears of rent "due on account of land," it seems to be beyond all question that it is capable of satisfying all the conditions required by cl. 4, s. 23, Act X of 1859. That clause, it should be borne in mind, applies to suits for arrears of rent not only against ryots, but against all classes of under-tenants. This point has been settled by the decision of the Privy Council in the case of *Baboo Dhunput Singh v. Gooman Singh* (1). That was a suit for arrears of rent at enhanced rates against a *quasi-talookdar* holding an intermediate position between the proprietor and the ryots, and an objection was taken that the Revenue Court in which it was brought had no jurisdiction to try it. Their Lordships, however, overruled the objection upon the ground that the clause above referred to "contains provisions for all classes of under tenants."

It has been argued that as the land is not used for agricultural or horticultural purposes, the suit was not cognizable by the Revenue Court. I confess that I am at a loss to find out any satisfactory reason to justify such a distinction. There is nothing whatever in the words of the Legislature to support it. On the contrary, as land must retain its character as land whether it is used for agricultural or for building purposes, the contention seems to be directly in the teeth of the plain and obvious meaning of those words. Why then are we to dismiss the suit on the ground of such a distinction ? A suit for arrears of rent due on account of a piece of land, occupied by ryot's homestead, is clearly governed by cl. 4, s. 23, Act X of 1859, and there are many ryots in this country who do not hold any other lands than those occupied by their homesteads. A *patnidar* who holds an entire *purgunnah*, and never uses a single *kata* of the lands comprised in his *patni*, for agricultural or horticultural purposes, would have been liable to be sued, under that clause, if it had been still in force as law, and I see no reason, therefore, why the purpose for which the land is sued should

(1) 11 Dec. I. A., 433.

have anything to do with the jurisdiction conferred on the Revenue Courts by that clause. Whatever may be the true definition of the word "royt," as used in Act X of 1859, it is by no means necessary that he should be an actual cultivator. S. 6 says distinctly, that a royt who has "held" land for twelve years consecutively is entitled to a right of occupancy exactly in the same way as a royt who has "cultivated" land for the same period; and as cl. 4, s. 23, applies to all cases in which the subject-matter of the lease in land, I do not see the slightest reason why the defendant in this case should be permitted to object to the jurisdiction of the Revenue Court, even though he may not be a royt within the meaning of the Act. The land for which the rent is claimed is, it is true, situated within a bazar, and it is also true, that it is occupied by a building and not used for horticultural or agricultural purposes. But it is nevertheless land in every sense of the term, and as the suit is, therefore, a suit for arrears of rent due on account of land, it was instituted in the only Court in which it could have been instituted at the time. There is nothing whatever in the Act which says that the land should not be situated in a town or in the vicinity of a town; nor is there anything in it to give the slightest support to the contention that the land should be used for a particular purpose, or found in a particular condition, at the time when the suit is brought, before the Revenue Court can assume jurisdiction to try it. Suppose, for instance, that a royt cultivates his land with paddy for one year, and then erects a building upon it or allows it to remain uncultivated in the next year, a suit for arrears of rent due for the first year would certainly be governed by cl. 4, s. 23, Act X of 1859, and I see no reason whatever why the same clause should not apply to a suit brought for the arrears of the next year.

It has been said that there are several decisions of this Court by which it has been held that suits for arrears of rent due on account of lands not used for horticultural or agricultural purposes are not governed by Act X of 1859. I have carefully read those decisions, but with the greatest deference to the learned Judges by whom they were passed, I feel myself bound

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to say that they are based upon an erroneous construction of the law. I wish to add further that there are some decisions to the contrary effect—see *Tariney Persad Ghose v. The Bengal Indigo Co.* (1), *Gastree Dabee v. Thakoor Doss* (2), *Shaikh Nasur Ali v. Saadut Ali* (3), *Watson v. Govind Chunder Mozoomdar* (4), *Matunginee Dassee v. Haradhun Doss* (5), and *Ram Churn Singh Khettree v. Meadhun Durjee* (6), so that there is no ground whatever for saying that the question has been set at rest by a long and uniform current of decisions. Indeed, the point was only a few days ago referred to a Full Bench in Special Appeal No. 31 of 1871, though I regret to say that the reference fell through in consequence of the Judges sitting on the Full Bench having come to the conclusion that the question did not arise in the particular case.

As, however, the view taken by me is in conflict with that taken by some of the learned Judge of this Court, I would reverse the decision of the lower Appellate Court subject to the opinion of a Full Bench.

The plaintiff appealed under cl. 15 of the Letters Patent against the decision of Glover, J.

Mr. Montrieu (with him Baboo Ashutosh Dhur) for the appellant.

Mr. Twidale for the respondent.

Mr. Montrieu.—The present suit is for rent of the land and not of the building on it, which is admitted by the plaintiff to be the defendant's property. In the present appeal the point raised is whether the Revenue Court had jurisdiction to entertain this suit. In *Mathurnath Kundu v. Campbell* (7), it was held that a suit for rent of land would lie in the Revenue Court, though that land had buildings on it. Here the land is one thing and the

(1) 2 W. R., Act X R., 9.

(4) W. R., Jan. to July 1864, Act X

(2) W. R., Jan. to July 1864, Act X R., 78.

R., 64.

(3) *Ib.*, 102.

(5) 5 W. R., Act X R., 60.

(6) 8 W. R. 90.

(7) *Post*, 115.

house another. [AINSLIE, J.—The case you quoted is for rent. The present case is one for enhancement of rent, and the question before us is whether a suit for enhancement of rent of land covered with buildings would lie in the Revenue Court. COUCH, C. J.—The question is, whether enhancement applies to all kinds of land.] The case of *Mathuranath Kundu v. Campbell* (7)

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(7) *Before Mr. Justice Norman, Officiating Chief Justice and Mr. Justice Loch.*

MATHURANATH KUNDU (DEFENDANT), v. **W. CAMPBELL, MANAGER,**
ON BEHALF OF **SCOTT MONCRIEFF**
(PLAINTIFF).*

The 29th April 1871.

Mr. J.S. Bockfort for the appellant.

Mr. R. T. Allan and *Baboo Bhowani Churn Dutt* for the respondent.

NORMAN, J.—This is a suit brought in the Collector's Court under Act X of 1859, for the rent of a very considerable tract of land described as a twelve-anna darpatni talook of Mauza Majampur, and all the jotes, lately held by Mr. Kenny in the sixteen-anna of the village two brick building in the shape of a half moon, each containing twenty apartments, with a brick-built godown standing on the said jotes, with khas, fallow, jalkur, cunkur, churs, &c., lakhiraj lands in Mauza Majampur, a four-anna dar-ijara of Mauza Majampur, Mauza Moorareepore, and lakhiraj lands in Bahadoor Khalee, containing in all 1,930 bigas. The enumeration of the different tenures and ryots' holdings in the kabuliati, which was duly registered, is written in Bengali, and occupies twenty-five closely written sheets of the largest sized brief paper,

There are huts upon the land in question, and the brick-houses, included in the lease, are apparently of considerable value.

The Assistant Collector of Kooshtea, who tried the case, says:—"There are

certain pecca houses on the land, and no doubt part of the rent stipulated is really on account of house-rent. But neither is the amount of house-rent nor the fact that anything is due on account of house-rent mentioned in the kabuliati. The houses are merely mentioned in a list of property, the mention of them is merely descriptive." There is also "a clause whereby the tenant is bound to keep the houses in good repair, and the right of letting them is made over to him specifically. The defendant objected before the Assistant Collector that a suit for rent could not be maintained in the Collector's Court. The objection was overruled by the Assistant Collector, and his decision has been affirmed by the Judge on appeal. The objection has now been renewed on special appeal before this Court. It seems to be supposed that there is a considerable conflict of decisions on the question before us; but I think that, when the cases are closely examined it will be found that such is not the case.

The preamble of Act X of 1859 recites that "it is expedient to re-enact, with certain modifications, the provisions of the existing law relative to the rights of ryots with respect to the delivery of pottas and the occupancy of land, to the prevention of illegal exaction and extortion in connection with demands of rent, and to other questions connected with the same; to extend the jurisdiction of Collectors, and to prescribe rules for the trial of such questions, as well as of suits for the recovery of arrears of rent, and of suits arising out of the distraint of property for such arrears." Upon

*Special Appeal, No. 1953 of 1870, from a decree of the Additional Judge of Nuddea, dated the 16th June 1870, affirming a decree of the Assistant Collector of that district, dated the 26th June 1869.

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shows that the suit, where the rent sought is for the land and not for the house, must be brought in the Revenue Court. There is a distinction between shop-rent and rent for the land on which a shop is built. The words of Act X are general. There is nothing in the wording of the Act which shows that

the language of this preamble, I desire to observe that, the suits for the recovery of arrears or rent do not appear to be limited in any way. There is nothing to restrict the word "rents" to rents due from ryots. The 23rd section enacts that "all suits for arrears of rent due on account of land either khiraji or lakhiraj, or on account of any rights of pasturage, forest-rights, fisheries, or the like, . . . shall be cognizable by the Collectors of land revenue, and shall be instituted and tried under the provisions of this Act, and, except, in the way of appeal as provided in this Act, shall not be cognizable in any other Court or by any other officer, or in any other manner."

We have to consider whether the suit with which we have to deal is a suit for the rent of land. If so, the Collector's Court, and the Collector's Court alone, had cognisance of it under Act X.

If the principal subject of the demise, that for which substantially the rent is reserved, is land, I think it matters not that the value is increased by houses or other buildings standing upon the land. This Court so held in *Tarney Persad Ghose v. The Bengal Indigo Company* (a). The rent of land does not represent its value in a state of nature or as jungle, but as improved land, and whether the improvement consists in the clearance of jungle, draining, fencing, accessibility by roads made upon or leading to it, contrivances for irrigation, or buildings erected upon the land, does not, in my opinion, in any way affect the question. In all cases such as I have supposed, the price for the use of the land in its improved state is rent, which can be sued for in the Col-

lector's Court. By way of analogy, I desire to refer to the fact that in England it has long been settled that though the value of demised premises may be increased by the goods on the premises, yet the rent must be deemed to issue out of the house and land, and not out of the goods; and consequently a landlord does not lose his remedy by distress when goods are let with a house as where a furnished house is the subject of the demise, one rent only being reserved. See *Newman v. Anderson* (b). On the other hand, where the principal subject of occupation is a building or buildings, when the rent is substantially the price of the use and occupation of such building or buildings, the land on which the buildings stand being a merely subordinate matter, it may well be that therefor for such buildings cannot be truly described "as the rent of land either khiraji or lakhiraj." The cases of *Maharaja Dhiraja Mahtab Chand Bahadur v. Makund Ballabh Bose* (c), *Bipro Doss Dey v. Wollen* (d), and *Hari Mohan Sirkar v. Moncrieff* (e), 7th December 1170, fall apparently within this class of cases. If a zemindar could not sue a patnidar or an isardar for rent under s. 23. of Act X of 1859, merely because there were a few houses on the land demised, he would in fact be wholly without remedy.

I am of opinion that in the present case the suit is a suit for the rent of land, and therefore that the decisions of the lower Courts must be affirmed with costs.

LOCKE, J.—I quite concur.

(b) 2 B. & F., N., R., 224.

(c) *Post*, App., 13.

(d) 1 W. R., 223.

(e) *Post*, App., 14.

(a) 2 W. R., Act X R., 3.

it applies only to cultivated land. A suit for enhancement of rent is still a suit for rent. The question, now, is one of jurisdiction, not of the right to enhance.

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After going through the judgment of Mitter and Glover JJ., and all the cases cited, the learned counsel referred to two recent cases, *Brajanath Kundu Chowdhry v. Lowther* (1), and *Madan Mohan Biswas v. Stalkart* (2). [Ainslie, J.—In the case of *Mathuranath Kundu v. Cambell* (3), Norman J., held that the minor portion of the land must follow the larger, which was in that case agricultural.] Norman, J., does not appear to draw this distinction. There are conflicting decisions on this point of jurisdiction. The purposes for which land is used is wholly immaterial. [Couch, C. J.—This is a suit for enhancement of rent. Can the rent of lands occupied by buildings be enhanced?] That is a question, the answer to which depends on the merits of the case. After entertaining the suit, the Court may decide that such lands are not liable to enhancement.

Baboo *Ashutosh Dhur* on the same side. The question is, what is the meaning of "land" as used in Act X. There is no definition given to the word in the Act, nor is there anything in the Act itself to show that the word should not bear its ordinary meaning, but be understood in a restricted sense applicable only to one description of land. The cases quoted in support of the opposite view refer principally to rights of occupancy in lands on which buildings stand. In a case of the 28th June 1862, *Nawab Hajee Mahomed* (4), it was held that a suit for rent of land, which did not include the rent of the house, would lie in the Revenue Court. In *Baboo Dhunput Singh v. Gooman Singh* (5) it was objected that a suit for rent at enhanced rates against a talookdar holding an intermediate position between the proprietor and ryot, would not lie in the revenue Court, but the

(1) *Post*, 121.(2) *Ante*, 97.(3) *Ante*, 115.

(4) Board's Collection of Act X Rulings, p. 47.

(5) 11 Moo. I. A., 463.

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Privy Council overruled the objection. In *Kali Kishon Biswas v. Sreemuttee Jankee* (1), the question was whether a right of occupancy was acquired under Act X in lands covered with buildings, or in lands not used for agricultural or horticultural purposes. [Couch, C. J.—Is there any case holding that a suit for enhancement of rent of lands covered by buildings will lie in the Revenue Court?] The case of *Shaikh Nasur Ali v. Saadut Ali* (2) decided that the Revenue Courts have jurisdiction to determine the rent of land with a house on it. The judgment is very short, and it does not appear whether the present question was raised or not. [Couch, C. J.—What was the land in this case given for?] The pottah merely shows that Sadhan Bewah, from whom the defendant claims by purchase, was substituted as a tenant in the place of her deceased brother. It gives the rate of rent which was to be paid, but contains no mention of any purpose for which the land was to be used. It is in the form of an ordinary ryoti pottah.

Mr. Twidale for the respondent.—There is really no conflict of decisions on the point raised in this appeal. There is not a single decision (except that of Mitter, J., in the present case) which distinctly holds that a suit for enhancement of rent of land covered by buildings will lie in the Revenue Court. In *Chotuck Pandoo v. Mirza Innayut Ali* (3), a Full Bench of the Agra High Court has held that land used for building purposes does not come within Act X of 1859. Looking at the Act as a whole, there cannot be any doubt that its object is to deal with the relationship between owners and cultivators of the soil. For instance, how can the provisions of s. 17 be made applicable to lands of the description in the present suit. In *Khalut Chunder Ghose v. Minto* (4) the object and purport of Act X was most fully discussed, and the learned Judge deciding that case has very clearly shown that

(1) 8 W. R. 250.

(3) 3 Agra Rep., 52.

(2) W. R., Jan. to July 1864, Act X R., 102.

(4) 1 Ind. Jur., N. S., 426.

land in Act X of 1859 means land which is the subject of cultivation. See also the cases of *Okurch v. Ramtanu Shaha* (1) *Khairudeen Ahmed v. Abdul Baki* (2), and *Ramdhan Khan v. Haradhan Paramanick* (3.)

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Mr. Montriou in reply.—To limit the meaning of the word “land” is to introduce a new construction, new ideas, and new words into the Act. This limitation of meaning is not a safe legal rule of construction. There is nothing in Act X of 1859 to oblige this construction.

The jurisdiction of the Revenue Court to entertain a suit like the present, and the liability of the tenant to an enhancement of rent, appear to be confounded. The latter depends entirely on the merits of the case. It comes to this then, that, in order to decide whether the suit will lie, you will have to decide on the merits, viz., to decide whether the tenant's rents can be enhanced or not. There cannot be a distinction on the question of jurisdiction, between a suit for arrears of rent and a suit for arrears of rent at enhanced rates. The general principle will have to be decided whether Act X of 1859 deals with such lands at all.

COUCH, C. J.—This suit was brought in the Court of the Deputy Collector of Jessore under cl. 4, s. 23 of Act X of 1859, for arrears of rent at an enhanced rate, of land held by the defendant in the Jessore Bazar. The land was occupied by a building, which was admitted to be the property of the defendant, and no part of the rent claimed was alleged to be due on account of the building. When, or under what circumstances, the building was erected does not appear. The Deputy Collector made a decree for rent at an enhanced rate, which was reversed by the Officiating Judge of Jessore on the ground that the suit should not have been brought under Act X of 1859. He seems to have considered it as a suit for the rent of a house which it was not, but possibly he may have meant the rent of the land

(1) *Ante*, 105.

(2) *Ante*, 103.

(3) *Ante*, 107.

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upon which the house stood. On special appeal to this Court the learned Judges by whom the case was heard were divided in opinion,—Glover, J., holding that the rent of land used for building purposes cannot be enhanced by a suit under Act X of 1859, and Mitter, J., holding that a suit for arrears of rent of land, although it was occupied by a building, was within cl. 4 of s. 23; apparently assuming that if a suit for rent would lie a suit for enhanced rent would. And if by land in that clause is meant land occupied by a building, I do not see how the conclusion that a suit for a higher or enhanced rent of such land may be brought in the Collector's Court can be avoided. The erection of a building upon the land with the consent of the landlord does not give to the occupant a right to hold the land perpetually at the same rent. If his rent was liable to be raised before, it would be so still, unless the circumstances amounted to an implied contract on the landlord's part that he should always hold at the same rent, or, in fact, to the grant of a perpetual tenancy at a fixed rent, which would be determined by the Court in a suit between them. If, as Mitter, J., thinks, s. 6 of Act X applies, and a ryot holding such land for twelve years has a right of occupancy, s. 17 must also apply so far as the ground for enhancement can be made applicable. But I think that in determining what is the meaning of "land" and "holding land" in Act, X we must look at all the provisions of the Act. It may be assumed that it was not intended that one part of it should apply to one kind of land and another part to another, and that land in s. 23 should have a different meaning from what it has in other sections. The Deputy Collector says with truth that it is extremely difficult to apply to bazar lands occupied merely as building ground the provisions of s. 17, which are manifestly intended to be applied to the rent of lands used for agricultural purposes. And these are not the only provisions in the Act of which that may be said. S. 112 and the following sections can only apply to land used for cultivation. The intention of the Legislature is to be deduced from the whole Act, and a construction which makes the whole of it consistent is to be preferred. I think this is the ground of the decisions in this Court that lands used for building

urposes are not liable to enhancement under Act X. And when we consider that a right of occupancy of land used for building purposes at a permanent rent may depend in some cases upon the terms of the original letting or upon equities arising out of the landlord's conduct, the suit for a higher or enhanced rent seems to be properly cognizable in the ordinary Civil Courts. I therefore think the decree should be confirmed.

AINSLIE, J.—I concur.

BAYLEY, J.—I am of opinion that the suit for enhancement under the circumstances of this case will not lie under Act X. of 1859, and the current of decisions is to that effect.

Decree affirmed.

Before Mr. Justice E. Jackson and Mr. Justice Mitter.

BRAJANATH KUNDU CHOWDHRY AND OTHERS (PLAINTIFFS)
v. LOWTHER (DEFENDANT),*

1872
Feby. 9.

Act VIII of 1869 (B. C.)—Lands occupied with Buildings, Suit for Enhancement of Rent of—Jurisdiction.

A plaintiff brought a suit for enhancement of rent of lands occupied with buildings, under Act VIII of 1869 (B. C.)

Held, per E. JACKSON, J., that, though Act VIII of 1869 (B. C.) does not apply to lands used for building purposes, the Civil Court has jurisdiction to determine suits concerning the rent of such lands, and therefore had jurisdiction to entertain the present suit.

Held, per MITTER, J., that the word "land" in Act VIII of 1869 (B. C.) is used in its ordinary sense, quite irrespective of the purposes for which it is applied, and that a suit for enhancement of the rent of land on which a house is built, will lie under Act VIII of 1869 (B. C.)

THE plaintiffs, before the passing of Act VIII of 1869 (B. C.), served the defendant with a notice under Act X of 1859, demanding enhanced rent for their tenure on all the grounds specified in s. 17 of the Act. After the service of this notice, Act VIII of 1869 (B. C.) came into force.

* Special Appeal, No. 633 of 1871, from a decree of the Additional Judge of Hooghly, dated the 6th March 1871, affirming a decree of the Moonsiff of that district, dated the 29th December 1870.

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The plaintiffs instituted the present suit in the Moonsiff's Court against the defendant claiming rent at the enhanced rate mentioned in the notice.

The defendant (*inter alia*) objected to the hearing of the suit on the ground that the land, the rent of which was sought to be enhanced, being land used for building purposes situated in the midst of a town, was not land within the meaning of either Act X of 1859, or Act VIII of 1869 (B. C.), and that therefore no suit for rent an account of it would lie under Act VIII of 1869 (B. C.) The Moonsiff dismissed the suit, holding that it would not lie under Act VIII of 1869 (B. C.) The plaintiffs appealed, and the Additional Judge, who heard the appeal, agreeing with the Moonsiff, confirmed his decision.

The plaintiffs preferred a special appeal to the High Court against the decision of the Additional Judge.

Baboo Ashutosh Dhur for the appellants.—Act VIII of 1869 (B. C.) makes no distinction between lands used for cultivation or other purposes—*Khalut Chunder Ghose v. Minto* (1) *Kali Kishen Biswas v. Sreemutty Jankee* (2), *Ranee Shurna Moyee v. Blumhardt* (3), *Kali Mohan Chatterjee v. Kali Krishna Roy Chowdhry* (4), *Kalias Chandra Sirkar v. Durgadas Tarafdar* (5), and *Nuimudda Jowardar v. Mancrieff* (6), which defined the meaning of the word “land” as used in Act X of 1859, do not apply to Act VIII of 1869 (B. C.) The meaning given to the word “land” as used in Act X of 1859, in *Khalut Chunder Ghose v. Minto* (1), which has been followed in the subsequent cases, is incorrect. In Act X of 1859, or Act VIII of 1869 (B. C.), there is no definition given of the word “land,” nor is there anything throughout these Acts which would lead to the inference, that they only provide for the rent of lands used for cultivation.

The cases only decide that suits for rent of lands not used for cultivation will not lie in the Revenue Courts; the Civil Courts have jurisdiction. The fact of the suit being insti-

(1) 1 I. J., N. S., 426.

(2) 8 W. R., 250.

(3) 9 W. R., 552.

(4) 2 B. L. R., App., 39.

(5) 3 B. L. R., A. C., 284; in foot-note

(6) *Id.*, 283.

tated under Act VIII of 1869 (B. C.) does not deprive the Civil Court of its jurisdiction.

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Mr. C. Gregory (with him Baboo Tarak Nath Sen) for the respondent. The cases cited show that Act X of 1859 does not apply to lands used for building purposes. Act VIII of 1869 (B. C.) merely transfers the trial of suits from the Revenue Courts to the Civil Courts, and it contains all the provisions of Act X of 1859. The notice in this case was served under Act X of 1859. The reasons which led the Judges in the cases cited to decide that the word "land" in Act X of 1859 referred to culturable lands, apply equally to Act VIII of 1869 (B. C.)

JACKSON, J.—We think that this case must be remanded to the Judge. As I understand the Judge's judgment, he has refused to try this case, because he states that it was instituted under Act VIII of 1869 (B. C.), and that Act VIII of 1869 (B. C.) is not applicable to lands used for building purposes. I understand that to be the whole of his judgment, and that he will not try the case, and does not go into the evidence in the case, because the suit is improperly brought under Act VIII of 1869 (B. C.) It seems to me that under s. 33, Act VIII of 1869 (B. C.), jurisdiction is given to the Civil Courts in all cases which were formerly brought under Act X of 1859 ; and, as regards all cases which did not fall within Act X of 1859, the jurisdiction of the Civil Courts still remain as it was before. The meaning of passing this law of 1869, or at all events one of the reasons of the Legislature for enacting that law was to put an end to a great extent to collision and to the difficulties which arose in ascertaining the jurisdiction between the two Courts, Revenue and Civil. This suit having been brought in the Civil Court, the question can be determined whether the plaintiff is entitled to enhance the defendant's rent or not. It is true, as argued by the pleader for the respondent, that a notice was served under Act X of 1859, but this seems to us to be immaterial. It was quite proper that a demand should be made in some way, and the notice, whether given in the form prescribed by Act X of 1859 or any other form is a sufficient demand for the enhanced rate. The plaintiff

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having brought his suit, it remains then for the Civil Court to decide whether he is entitled to what we demands from the defendant. The Court will have to look into the grounds upon which the demand is made, whether they are sufficient grounds, and whether sufficient evidence have been given of the existence of those grounds, and to decide whether the plaintiff is entitled to enhance the defendant's rent or not. We set aside the decision of the Judge, and remand the case to be tried.

The costs of this appeal to be costs in the suit.

MITTEE, J.—I am of the same opinion. I do not see any reason why this suit should not have been tried as a suit under Act VIII of 1869 (B. C.) The rent claimed is alleged to be due on account of land, and it makes no difference whether the lease was originally granted for building purposes, or whether the land is situated in part of a town. S. 23, Act X of 1859, distinctly says that all suits for arrears of rent due on account of land shall be brought in the Collectors Court and nowhere else ; and as the jurisdiction of the Collector has been transferred to the Civil Court, there seems to be no reason whatever why the suit should not be tried by that Court, when it is perfectly clear, that the plaintiff is suing for the rent of the land, and not for that of the buildings which admittedly belong to the defendant. I have already expressed my opinion on this point at some length in a case (1) which recently came before me, and I do not therefore wish to say anything further.

Decision set aside and case remanded.

(1) *Rani Durga Sundari Dasi v. Bibi Umdatannissa*, ante, 101.

Before Sir Richard Owen, Kt., Chief Justice, and Mr. Justice Ainslie.

**KHASKI ROY AND OTHERS (PLAINTIFFS) v. FARZAND ALI KHAN
AND OTHERS (DEFENDANTS).***

1872
June 3.

*Enhancement of Rent—Act X of 1859, s. 13—Act VIII of 1869 (B. C.),
s. 14—Service of Notice—Suit by Lessee for Enhancement of Rent under
a Notice served by the Lessor.*

Where a zemindar served a notice of enhancement of rent on the ryots of a mauza, and afterwards granted a lease of the mauza to the plaintiff, *held*, the plaintiff was entitled to sue for enhancement upon the notice already served.

Durgah Roy v. Shyam Jha (1) commented on.

MUSSAMAT PARBATTI, who was the owner of one-third, and *ticcadar* of the other two-thirds, of Mauza Samoo, served, in Chaitra 1276 Fasli (March 1869), a notice of enhancement of rent on Farzand Ali Khan and others, ryots of the Mauza. After such notice she granted a lease of the Mauza to Khaski Roy and others to take effect from the beginning of the Fasli year 1277 (1869-70).

The suit was instituted by the lessees against the ryots for enhancement of rent in terms of the notice which had been served by Mussamat Parbatti.

The defendants set up (*inter alia*) in their written statement that the suit could not be maintained on the ground that the notice of enhancement had been served by the zemindar, and not by the lessees, their immediate landlords.

The Moonsiff held that the plaintiffs were entitled to institute the suit, the notice having been served by Mussamat Parbatti, their lessor, whose representatives the plaintiffs were. He accordingly passed a decree in favor of the plaintiffs.

On appeal, the Judge held that the notice ought to have been served on the application of the person to whom the rent was

* Specials Appeal, Nos. 1192, 1193, and 1194 of 1871, from the decrees of the Officiating Additional Judge of Tirhoot, dated the 2nd May 1871, reversing the decrees of the Moonsiff of that district, dated the 22nd February 1872.

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payable; that a zemindar who had leased out his property to a farmer had no right to serve a notice of enhancement during the continuance of the lease, and consequently the farmer could not sue upon a notice served by the zemindar before the commencement of his tenancy; that the notice ought to have been served by the plaintiffs to whom for the time being the rent was payable. Citing *Benodee Lal Ghose v. Mackenzie* (1), he dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Mr *Lingham* (Baboo *Bamacharan Banerjee* with him), for the appellant, contended that the notice was good under s. 13 of Act X of 1859, and s. 14 of Act VIII of 1869 (B. C.)—*Gubdoo Mull v. Hoolasee and Tej Singh* (2); that the case of *Benodee Lal Ghose v. Mackenzie* (1), cited by the Court below, really favored his contention, but it was badly reported, as it gave no facts on which the decision was founded. The case of *Doorga Roy v. Shyam Jha* (3) professed to be based on the last case, but it in fact contradicted that case, and there could be no doubt that it was mis-reported.

Mr. *O. Gregory*, for the respondent, contended that, under s. 13, Act X of 1859, the notice should have been served by the lessees, and that the suit could not be brought by the lessees under a notice served by the zemindar—*Doorga Roy v. Shyam Jha* (3) and *Benodee Lal Ghose v. Mackenzie* (1).

The judgment of the Court was delivered by

COUCH, C.J.—In this case, the notice of enhancement was served by the person to whom, at the time of the service of the notice, the rent was payable, and that appears to be what is required by the Act. The question, indeed, which is raised here is, whether the notice having been served by the person to whom the rent was then payable, that person can, either entirely

(1) 3 W. R., Act X R., 157.

(3) 8 W. R., 72.

(2) 2 Agra H. C. Rep., 247.

by a sale, or partially by a lease, convey to the purchaser or lessee the rent, with the incident of its being liable to be enhanced under that notice. I do not see any reason why he should not be at liberty to do so : there is nothing in the Act which prohibits it. The enhancement is an incident to the rent which he conveys away and it would cause the greatest inconvenience, and might sometimes cause considerable injustice, if it was not possible for the zemindar who had given notices of enhancement to make any disposition of his property, without the whole of the notices falling to the ground, and the person who took from him, whether as purchaser or lessee, being obliged to serve fresh notices before any steps could be taken to enhance the rent. I cannot think that that was intended by the Legislature, and there are no words in the Act which would lead me to suppose that it was.

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With regard to the case of *Doorga Roy v. Shyam Jha* (1). I cannot help thinking that it must be in some way mis-reported, and that the learned Judges did not decide what they are reported to have done. Glover, J., says :—"When the notice was served, the zemindar was in possession and in receipt of rent. No farm had been given, and the farmer did not exist. The wording of s. 13 is imperative, and makes it absolutely necessary that the party to whom the rent is payable should be the one to issue notice,"—so far that is exactly what the section does say,—“and when this notice was served, the farmer was not that party.” No doubt, the farmer was not that party then, and was not the party to serve the notice; the zemindar was the party then, and the party to serve the notice. The Judges seem to think that the notice must be served, not by the party to whom the rent was payable, but by the party to whom the enhanced rent would be payable. Then they say :—"A ruling of this Court [*Bendoo Lal Ghose v. Mackenzie* (2)], supports this view of the question," but really it does not, and this makes me think there is some mistake in the report, and that it cannot be treated as a decision on this point in favor of the present respondent.

(1) 8 W. R., 72.

(2) 3 W. R., Act X R. 157.

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I think that here the notice was a good notice at the time it was given, and that the lessee is entitled to the benefit of it, and may bring the suit for enhancement. Any defence which the tenant might have against the zemindar, would be good against the lessee. The tenant is not in any way injured by the lessee being allowed to bring the suit upon the notice which was given by the zemindar.

The decree of the Court below must be reversed, and the suit remanded for re-trial. The appellant will have the costs of this appeal.

Decree reversed and case remanded.

[ORIGINAL CIVIL]

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Macpherson.

1872
March 12.

GANGADHAR SARKAR AND ANOTHER (DEPENDANTS) v. KASINATH BISWAS AND OTHERS (PLAINTIFFS).

Sale of Land by Receiver—Mis-description—Purchaser having personal Knowledge—Title to Land between high and low-water Mark—Rescission of Contract—Parties.

The defendant who for twelve years had occupied land as tenant, purchased the land at a sale by the Receiver, but refused to complete the purchase on the ground of material mis-description in the advertisement of sale, in that a road and ghat, comprised within the boundaries mentioned in the advertisement, were not the property of the parties whose land the Receiver purported to sell, and also that, to make up the quantity of land as stated in the advertisement, *vis.*, twenty bigas by estimation, land lying between high and low-water mark had been taken into calculation. The owners of the property sold having brought a suit against the defendant for specific performance, the defendant contended that the Receiver was a necessary party to the suit, and that the sale had been rescinded by a statement of the Receiver that he would forfeit the deposit in the event of the defendant not carrying out his contract. In support of his objection to quantity, the defendant relied on a Collectorate chitta as showing that the area of the land sold was only 2 bigas, 8 katas, 10½ chittaks; the same chitta, however, in giving the eastern boundary of the property, described it as lying "on the west of the low-water of the Ganga."

Held, that there had been no rescission of the contract; that the plaintiffs being owners of the land down to low-water mark, were entitled to all subsequent accretions, and were, therefore, entitled to include in their measurement all land down to

low-water mark; and, having regard to the fact that the defendant was personally acquainted with the property sold, it was not open to him to repudiate the contract on the ground of mis-description. The plaintiffs were entitled, therefore, to a decree for specific performance.

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THIS was an appeal against a decision of Phear, J., dated 29th August 1871, decreeing specific performance of an agreement for the purchase of certain land.

The land had been offered for sale on 13th July 1869, by the Receiver appointed in the suit of *Chandranath Biswas v. Biswanath Biswas* under an order dated the 11th August 1868, and it was described in the advertisement of sale as—

“Lot No. 7.—All that piece or parcel of chur-land, commonly called Geodi mehal, containing by estimation twenty bigas, be the same more or less, situate, lying, and being in Ghosery, Sulkea aforesaid, on the western bank of the river Hooghly, and butted and bounded as follows, viz.—On the east by the river Hooghly; on the north by Suttopirtollah and the shore of the lake-shur-land, formerly belonging to Krishna Nanda Biswas, and now in the possession of the said Mr. John Stalkart; on the west by the Strand Road, and on the south by Nktar Sirkar's lands; the annual ground revenue of which is Rs. 29-9-7, or thereabouts.”

At the end of the advertisement was a notice that further particulars might be obtained at the office of the Receiver, and also of Baboo Dinanath Bose (the attorney for the vendors).

Among the conditions of sale were the following :—

“That the purchaser shall not be entitled to call upon the Receiver for any other documents or evidences of title relating to the premises sold than such as are in his possession, custody, or control; and, after the sale, no objection to title will be allowed.

“If there be any mis-statement or error in the description of the property as to quality or quantities of land, or in any other particulars, such mis-statement or error shall not annul the sale, nor entitle the purchaser to be discharged from this purchase, but a compensation shall be given or taken as the case may require; but no such compensation shall be given to the purchaser, unless due notice and particulars of the error and claim shall be given to the Receiver within fifteen days from the date of sale.

“The Receiver will not enter into any covenant, except that he has done no act to encumber the premises sold.”

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There was also a condition enabling the Receiver to forfeit the deposit and re-sell the property, unless the purchaser paid the balance and completed the purchase.

The defendant Gangadhar Sirkar who had for twelve years been tenant in occupation of the land, purchased it under the above conditions in the *benami* name of his son, the defendant Kailas Chandra Sirkar; and Kailas Chandra Sirkar at Gangadhar Sirkar's instance, as was alleged in the plaint, signed the usual agreement to be bound by the conditions of sale, &c. On the day of the sale he paid the Receiver Rs. 3,000 by way of deposit; and on the 16th July he paid a further sum of Rs. 6,000 towards the total deposit of 25 per cent. required by the conditions of sale.

In their written statement the defendants stated that within the boundaries mentioned in the advertisement were comprised on the south side a ghat and road-way leading thereto, which the defendant Gangadhar Sirkar believed, at the time of the sale, to be a part of the property intended to be sold, and one of the reasons which mainly induced him to bid for the same was that the said ghat and road-way would be a source of considerable profit to him, the same being a landing-place for goods and passengers.

On the 16th July, and again on the 19th, Gangadhar Sirkar's attorneys wrote letters asking the Receiver for the title-deeds of Lot No. 7, and on the 20th, the Receiver's attorney replied that the Receiver never had possession of any title-deeds of that property.

On the 24th July [which was within fifteen days from the date of the sale], Gangadhar Sirkar's attorneys submitted certain "objections to the quality and quantity and description of the property." The first was that the southern boundary was not "Ektar Sirkar's lands," as stated in the advertisement, but a public road, called Sulkea Mookerjee's Ghat Road, and running between Ektar Sirkar's lands and the lands of Lot 7. The second objection was that the lot did not contain 20 bigas as stated: and a certain Collectorate chitta, No. 3 of 1847, was referred to as showing that only 9 bigas 8 katas 10½ chittaks belonged to the Biswas family. The third objection was that,

whereas the advertisement stated the rent to be Rs. 29-9-7, it was in reality Rs. 38-6-8; that Government had enhanced the revenue payable by the semindar to Rs. 5-5 per biga; and that the semindars contemplated enhancing the rent payable to them.

On the 9th August, the Receiver's attorney replied to those objections. He said:—"True it is that Sulkea Mookerjee's ghat is on the southern limits of the chur land sold to your client, and that Ektar Sirkar's land on the south side of the said ghat was mentioned in the advertisement as the southern boundary. This is because the parties herein claim this piece of ghat land as their property." Then, as regards the measurements, he said that they were correct; that Gangadhar Sirkar himself was present when they were made, and, having been twelve years in actual possession as tenant of the land, was perfectly acquainted with the quality, quantity, and description of the land; that the measurement given in the Collector's chitta referred to had been made in 1847, since which time there had been considerable accretions, and that the statement as to the rent being Rs. 29-9-7 was correct, as that sum had been paid for the last thirty years. On the 17th August, the Receiver wrote that he would forfeit the appellant's deposit under the terms of the conditions of sale, unless he paid the balance and completed his purchase. Gangadhar Sirkar's attorneys replied that he had no right to forfeit the deposit, and they demanded that it should be repaid to them within two days. Further correspondence ensued; and as Gangadhar Sirkar refused to complete the purchase, the Receiver applied to the Court, by petition in the suit of *Biswas v. Biswas* for an order to compel him to complete. This application was refused on the 28th February 1870, on the ground that the proper mode of proceeding, under the circumstances, was by a separate suit.

In April 1870, the Receiver applied to the Court for leave to sue; but his application was refused by Phear, J., on the ground as stated by Counsel, that the *Biswas'* suit had been pending some twenty years unnecessarily and improperly. In September of the same year, the Receiver renewed his application for leave to sue, the present plaintiffs joining in the application: but leave was again refused by Phear, J. They appealed

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from his order ; and, on the 3rd February 1871, the Appellate Court granted the leave prayed for. On the 28th February 1871, the plaint in the present suit was filed, the Receiver being one of the plaintiffs. In admitting the plaint, Phear, J., expressed a strong opinion that the Receiver ought not to be a party to the suit : [See *Wilkinson v. Gangadhar Sirkar* (1).] Consequently leave was afterwards applied for by the plaintiffs to strike out the Receiver's name, and it was struck out.

The defendants in their written statement contended that the suit ought to have been brought (if at all) in the name of the Receiver, and not by the plaintiffs ; that the suit was not maintainable against both defendants. but that the plaintiffs ought to have elected which defendant they would proceed against, to ought to have brought the suit (if at all) against the defendant Gangadhar Sirkar alone. It was also contended, on behalf of the defendants, that the plaintiffs, through their agent the Receiver, had rescinded the contract by the threat to forfeit the deposit contained in the Receiver's letter of 17th August.

PHEAR, J.—It appears to me clear that the plaintiffs are entitled to either a specific performance of the contract on part of the defendants or to damages.

The contract is admitted, and it seems to be agreed, that the plaintiffs have shown a title which, *prima facie* at least, extends to all the lands in question. It therefore became incumbent on the defendants to make out in some way or other that they were entitled to escape from their obligation to perform their contract. In this suit it thus fell on them to begin. They first objected to the plaintiff's right to sue on the contract. I have elsewhere at some length given my reasons for thinking not merely that the present plaintiffs are entitled to sue on this contract, but that no one else could do so, standing on their side of the controversy. It was their property which the Court put up for sale. It was on their behalf that the contract of sale was made, and no one knew better than Gangadhar Sirkar himself that the Receiver was in no sense a principal ; that he was merely an agent, acting on behalf of the parties to the suit.

The defendant Gangadhar next, by the mouth of his Counsel, objected to the joinder of his son with him as a co-defendant in this suit. Rather a curious objection to make, certainly, under the circumstances of this particular case, inasmuch as he and his son do, in fact, appear by the same attorneys and Counsel ! If the objection were well-founded, it could of course at best result in my dismissing the suit as against that defendant, whether the father or son, whom I thought to be outside of the matter of the contract. But the same defendant by his own mouth said that both he and his son are interested in this contract, so that there is consequently an end of this part of the contest. A third objection to the plaintiff's suit was that the plaintiffs, by their agent the Receiver, had sometime ago rescinded this contract. But the mode in which that rescission was effected, if such rescission there was, took the shape of an assertion of the power reserved to the vendor to rescind the contract and forfeit the deposit in the event of the defendant failing to perform his side of the contract. There certainly was at no time any other rescission than this ; consequently, if the defendant chooses to insist on the rescission, it follows that the plaintiffs are entitled to retain the Rs. 9,000, the deposit-money. But, when I put this to Mr. Phillips, he very promptly, on behalf of his clients, declined to accept the proposition. I have already said that no other rescission than the one accompanied by the assertion of a right to retain the deposit-money was ever made by the vendors. Even that was withdrawn very long ago, and the parties have since been quarrelling with one other without any reference to it. The third objection therefore fails, as well as the two first.

On the merits of the case, as left between the parties at this point, it appears to me that three principal issues arise :—

1st.—Are the defendants entitled, in the events which have occurred, to rescind the contract ?

2ndly.—If not, ought specific performance of the contract to be decreed against them, and, if so, on what terms ? and

3rdly.—An issue subordinate to the second issue, namely, if specific performance ought not to be decreed, are the plaintiffs entitled to damages, and, if so, what damages ?

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I have framed the last issue in order that the whole matter in contest may be determined in this suit. For if I confined my decision to the matter of specific performance, and that proved to be adverse to the plaintiff, it would be still open to them to bring another suit for damages for the breach of the contract of which the Court had declined to decree the specific performance.

As I understand the defendant's case, he maintains that he is entitled to rescind for two separate causes, 1st, on the ground that he was led by the conditions of sale to believe that a certain road on the side of the premises in question, and the ghat to which the road leads, were part of the premises put up for sale; while he now finds from a letter written to him by the plaintiffs' attorneys in the course of enquiries as to the title, that that road and ghat are not included within the boundary of the premises, but on the contrary lie just outside that boundary. If I thought there was anything in the conditions of sale which could in reason support the inference that this road and ghat were represented by the vendor as part of the premises to be sold, I should consider the exclusion of these portions was a sufficient alteration of the subject of sale to justify the purchaser in repudiating his contract, because I think that a road and the ghat on the banks of such a river as the Ganges to be enjoyed as private property, portion of and incident to the land purchased, would be necessarily a very important ingredient in the matter of the contract. But it appears that there is not a word about the ghat or road in the conditions of sale. The only thing bearing on the point at all is that the southern boundary of the premises, instead of being, as it might have been, described as the road leading to the ghat, is described as Ektar Sirkar's land, which is the land just on the other side of the road. There is not the slightest indication that the vendors pretended to sell a road to a ghat, together with the ghat, and moreover it is perfectly certain, from the testimony of Gangadhar himself, that he was not in the least degree deceived on this point. He was himself the occupant of the premises in question for at least the last eight years; and he himself, when under examination,

described the ghat and road as a public ghat and road. He said that people bathed at the ghat, cargoes were brought to the ghat, and carried along the road to the screw-houses. It is perfectly impossible that he could at any time have supposed that the vendors pretended to sell this road and ghat as private property. If they had, by express words in the conditions of sale, stated that they were about to do so, I feel confident that Gangadhar would have been about the very first man to say that they could not. He knew well enough that the road and ghat were public, and I do not believe that he would ever have bought under a condition involving so much risk as, according to his own testimony, one containing a representation of this sort would involve. It seems to me then, as I have already said, there was not misrepresentation by the vendors on this head.

The other ground on which he says he is entitled to rescind is that the vendors, to make up the full quantity of land sold, have included land which lies below high-water mark, and, which therefore cannot be theirs. But he does not say that it does not fall within the description of the premises sold, or that the title offered does not in terms extend to it. All he says is in effect this, namely, that the land by its situation is such as must belong to the Crown, and therefore the plaintiffs cannot pass it to him. Probably if there were a question between the present vendors as riparian proprietors and the Crown, or any one representing the Crown, as to the precise line where the river-ward boundary of the vendors' property ran, it would be a presumption in favor of the Crown that that boundary lay along the line of medium high-water, as defined by Alderson, B., in the case which I referred to during the argument (1). But there is nothing, so far as I am aware, in the shape of an impossibility that a riparian proprietor in India should derive from the Crown itself such property as the Crown may have in the foreshore of a tidal river or sea. In England, undoubtedly, the Crown has always had the power of making a grant of the foreshore to private individuals, subject only to the condition, since Magna Charta, that the rights of the public must remain undisturbed; and I believe I am correct in

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(1) *The Attorney-General v. Chambers*, 4 De. G. M. & G., 206.

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saying that in England a very large portion of the foreshore is owned by private proprietors. As between the vendors and purchasers in this case, I have no reason for supposing that the vendors have not quite as good a title to the land below, as to that above high-water mark. What the nature of that title is I do not know, for the defendants have not questioned it before me; on the other hand, I have that which the defendant has made evidence in this case, though it might not have been so otherwise, tending greatly to show that the plaintiffs are owners of the foreshore; for the defendant in his requisitions, and again in the witness-box, has appealed to the Collector's chitta, and, in the Collector's chitta, the lot of which the vendors are undoubtedly proprietors, so far at least as high-water mark, is represented as extending to low-water mark.

The foregoing I think are the only grounds on which Gangadhar urges that he is entitled to rescind his contract. It is conceivable that he might have added that the description and conditions did not lead him to suppose he was buying any land lower than high-water mark, and that land so situated would be subject to public rights with which he was not prepared to be burdened. But he makes no objection of this kind, doubtless for very good reason, because, after the long enjoyment which he had had of the actual premises, no one could know better than he how the property stood.

Then, putting aside the question as to whether the road and ghat, including the space of foreshore down to low-water mark, were within the area sold, so far as the evidence before me goes, I cannot say I have the least doubt how the facts as to area are, viz., that the quantity is fully up to that mentioned in the conditions of sale. Probably the data on which Mr. Rowe laid down or took the lines of high and low-water were somewhat slight for the determination of such a question as that of boundary under the definition to which I have referred. It would be no light task to ascertain the line of medium high tides, exclusive of highest and lowest high tides of every month of the year. But such as this evidence is, I have no better before me. The testimony of G. C. Bose, whose evidence is placed in the opposite scale to that of Mr. Rowe, is really worse than valueless. It is surpris-

ing that the experience which has been at the command of the defendants, in the management of this case, was not able to bring in something more substantial. The total absence of anything better on the side of the defendant than this poor material justifies me in concluding Mr. Rowe's conclusions, however small the data on which they rest, are correct. I think, therefore, there is no reason for the defendant to claim compensation for loss of even a single bigha of land. It is very apparent to me that the defendant's resistance to the plaintiffs' suit is not dictated by any real grievance on his side. He has made a bargain against which he is unable to show any ground of complaint, except that he is exceedingly anxious to get relived from completing it. This Court does not, however, enquire particularly into the motives which actuate a defendant in resisting specific performance of his contract, excepting so far as a view of those motives serves to explain the character of the evidence adduced on his behalf. Nothing can be plainer than that G. C. Bose's evidence was framed to suit the defendant's purpose, and that Gangadhar Sirkar has, in fact, continually used this very land in the way of his occupation and employment down to low-water mark as Mr. Rowe deposed. I think the defence very discreditable on the facts, though of course I am bound to give the defendant the benefit of the law on those facts if he is entitled to it. I cannot at present determine whether or not, on the authorities cited by Mr. Phillips, the defendant is entitled to say to the plaintiffs, "you cannot at this date compel me specifically to perform the contract." But certainly, as it seems to me without reason, the defendant has failed to perform his contract, and, if he cannot now be forced to perform it, he must at least pay damages for the breach of it. In the contract itself, the parties agree that the deposit shall be taken as liquidated damages in the event of the defendant failing to complete. At present I see no reason why I should not, in the event of my awarding the plaintiffs damages, take that sum as the proper measure of damages. However, that point I will consider; only this much is clear that, when the parties have agreed that the deposit shall be liquidated damages, I must give at least substantial damages.

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On the next morning his Lordship gave the following judgment on the point reserved :

The point which I reserved yesterday was, whether there had been such delay on the part of the plaintiffs as disentitled them to the particular relief which they sought. I think the effect of delay on the plaintiffs' right to enforce specific performance is well stated by Wigram, V. C., in *Walker v. Jeffrey* (1). The Vice Chancellor there says :—" *Heaphy v. Hill* (2) and *Watson v. Reid* (3), are direct authorities that, if one of two parties concerned in a contract respecting lands, gives the other notice that he does not hold himself bound to perform, and will not perform the contract between them, and the other contracting party, to whom the notice is given, makes no prompt assertion of his right to enforce the contract, equity will consider him as acquiescing in the notice, and abandoning any equitable right he might have had to enforce the performance of the contract, and will leave the parties to their remedies and liabilities at law." In the present case certainly the plaintiffs did, upon the notice given to them by the defendant, make prompt assertion of their intention to enforce the contract, and took immediate steps for the purpose, though these in the end proved abortive, and they have done nothing since that time to lead the defendant to suppose that the right to enforce the contract specifically was given up by them. I think the objection on that ground fails, and that the decree should be for specific performance.

Mr. Marindin and Mr. Phillips for the appellants.

Mr. Evans and Mr. Macrae for the respondents.

On behalf of the appellants it was urged that the Receiver ought to be a party to the suit, since by the conditions of sale he was to be a party to any conveyance. That the ghat and road-way leading to it were included in the land covenanted to be conveyed, and that they were essential to the enjoyment of the property—*Peers v. Lambert* (4) and *Danny v. Hancock* (5). It was

(1) 1 Hare, 341 at p. 348.

(2) 2 Sim. & Stu.; 29.

(3) 1 Russ. & Myl., 236.

(4) 7 Beav., 546.

(5) 1 L. R., 6 Ch., 1.

also contended that there could be no accretion until the land rose above high-water mark—*Maharanes Odhiranes Narain Koomaree v. The Nawab Nasim of Bengal* (1) and *Nabin Kishor Roy v. Jages Prasad Gangopadhye* (2); that there was no evidence that the original grant of the land extended down to low-water mark, and that, to make up the 20 bigas covenanted to be conveyed, the land had been measured down to low-water mark. It was further contended that the suit ought to be dismissed on the ground of the unreasonable delay in instituting proceedings—*Southcombe v. The Bishop of Exeter* (3) and *Watson v. Reid* (4).

It was argued for the respondents that the road and ghat were not named in the particulars of the property to be sold, and were not essential to the beneficial enjoyment of the land. That knowledge of circumstances by the purchaser makes an exception to the general rule that a misdescription vitiates the sale. Specific performance may be decreed, notwithstanding the misdescription—*Dyer v. Hargrave* (5) *Lord Brooke v. Rounthwaite* (6), and *Vigors v. Pike* (7). As to the title to the land below high-water mark, it was said that the Collectorate chitta No. 3 was evidence of a grant by the Crown; that it is not necessary, in the transfer of property subject to public rights, to allege those rights; they attach themselves necessarily to the land, and it is taken subject to them—*Gann v. The Free Fishers of Whitstaple* (8), *Mayor of Colchester v. Brooke* (9), *The King v. Lord Yarborough* (10), *Gifford v. Lord Yarborough* (11), and *Phear on Watercourses*, 46. On the question of laches, the judgment of the lower Court, and *Sugden on Vendors and Purchasers*, 262, were referred to.

In reply it was contended that there was not sufficient evidence of knowledge, and that, therefore, the decision in *Dyer v. Hargrave* (5) did not apply; that the true test is whether compensation can be given or not. It was argued that

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(1) 4 W. R., 41.

(2) 6 B. L. R., 343.

(3) 6 Hare, 213.

(4) 1 Russ. & M., 236.

(5) 10 Ves., 505.

(6) 5 Hare, 298.

(7) 3 Cl. & Fin., 562.

(8) 11 H. L. C., 192.

(9) 7 Q. B., 339.

(10) 3 B. & C., 91; S. C., on appeal.
2 Blgh, N. S., 147.

(11) 5 Bing., 163.

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the ghat appeared *prima facie* to be part of the premises covenanted to be sold ; if otherwise, that it should have been so stated. As to title to land below high-water mark, the following authorities were referred to, Phear on Watercourses, 41 ; *Doe d. Rajah Seebkrsto v. The East India Company* (1).

The judgment of the Court was delivered by

MACPHERSON, J. (after stating the facts, his Lordship continued)—
The defendant appeals and contends that the decree is wrong, because there was a material and important mis-description of the property in describing it as bounded on the south by Ektar Sirkar's land ; because the land sold is deficient in quantity, inasmuch as there are not nearly twenty bigas, unless all the land down to the present low-water mark is included ; because the plaintiffs have no title to such portions of the land as are accretions to lands of the plaintiffs which are themselves below high-water mark ; because the rent payable to the zemindars is more than what is stated in the advertisement ; because the plaintiffs chose to rescind the contract of sale, and because the Receiver was a necessary party to the suit.

The last of these objections is, under the circumstances, a purely technical objection, on which, as it in no way affects the merits of the case, we should not (with reference to the provisions of s. 350 of Act VIII of 1859) be justified in disturbing the judgment of Phear, J. It is sufficient to say that it was by the order of the Court that the Receiver's name was struck out of the plaint, and that it is clear that the appellant has been in no degree damnified by its being so struck out.

There is no doubt that the southern boundary of this property was not given in the advertisement with such perfect accuracy and distinctness as it might have been, and perhaps ought to have been. But as regards this and certain other of the objections raised on behalf of the appellant, it is to be borne in mind that he, as having long been the tenant of the premises, and intimately acquainted with them, occupies a very different position before

the Court from that which would be the position of a stranger previously unacquainted with the property for which he was bidding. The case of *Colby v. Gadsden* (1) is an authority to the effect (and the rule is in itself perfectly fair and equitable) that, where a purchaser is personally acquainted with the real state of the property sold, he cannot, on account of a circumstance of which he was all along perfectly aware, and which was patent, either reject the contract, or demand an abatement of price.

On this question of mis-description, in giving Ektar Sirkar's land as the southern boundary, Phear, J., says :—" It is perfectly certain, from the testimony of Gangadhar (the appellant) himself that he was not in the least deceived on this point. He was himself the occupant of the premises in question for at least the last eight years ; and he himself, when under examination, described the ghat and road as a public ghat and road. He said that people bathed at the ghat, and that cargoes were brought to the ghat, and carried along the road to the screw-houses. It is perfectly impossible that he could at any time have supposed that the vendors pretended to sell this road or ghat as private property.' ' We entirely agree with the learned Judge in thinking that there is no doubt whatever that Gangadhar, who had himself been in actual occupation of these premises for many years, knew perfectly well that the ghat and road were not included in the sale, and that he was not in fact misled by the description. No one, on reading the advertisement, could seriously have believed that it was intended to include the ghat and road in Lot 7. The advertisement would certainly have made special mention of property of such peculiar value as a ghat, such as this is admitted to be, if there had been any purpose of selling it. The inaccuracy of description is really in itself very slight : for Ektar Sirkar's land is, in truth, the southern boundary, except for the intervention of this public road ; and, indeed it may be, for all that appears to the contrary, that the land on which the public road is, may have been a portion of Ektar Sirkar's land. As a further proof that the appellant must have known that there was

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(1) 34 Beav., 416.

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no idea of selling this ghat and public road, it is to be observed that in the Collectorate chitta of 1847, the land held by the Biswas family is described as lying "on the north of the passage to the ghat of the Mukhopadhya of Mauza Sulkea."

The only difficulty we have felt on this part of the case arises from the extraordinary, and so far as we can see unwarrantable, statement made by the plaintiffs' attorney in his letter of the 9th August 1870. In that letter it is said that Ektar Sirkar's land was given as the southern boundary, "because the parties herein claim this piece of ghat-land as their property;" and that, at a measurement made in the previous April at which the appellant himself was present, the chur-land was found to measure 20 bigas, a little more or less, "exclusive of the said ghat-land." How the plaintiffs' attorney came to write this letter is not explained. Reading it along with the words used in the advertisement, it might lead to the inference that the parties did mean to include this road and ghat-land in Lot 7. The letter, however, does not expressly say that it was so intended. On the contrary, it immediately proceeds to say that there are the full 20 bigas mentioned in the advertisement, without including the ghat-land. The letter moreover was not written till nearly a month after the sale, and it clearly could not have influenced the conduct of the parties before or at the sale. Under the circumstances, we do not think we ought to allow it to affect our judgment in the matter, as we are perfectly satisfied that, in fact, at the time of the sale, the plaintiffs had no intention of selling, and the appellant did not suppose them to be selling, the ghat or road-land.

The question as to the quantity of land in Lot 7, depends mainly on the plaintiffs' right to measure down to low-water-mark. Here again the appellant's personal acquaintance with the property for which he was bidding has a most important bearing. The appellant knew that he himself, as tenant in occupation, had for many years held the land down to low-water mark, using it for the special purposes of the business which he carried on. He knew also that the premises did not contain anything approaching to 20 bigas, unless all the land down to low-water mark was included. Therefore we have no hesita-

tion in finding as a fact that the 20 bigas by estimation, mentioned in the advertisement, and for which the appellant bid, were known by him to include all the land down to low-water mark. But Mr. Marindin contends that the plaintiffs, on their own showing, can have absolutely no title to much of this land, inasmuch as it is admittedly land which has come into existence by accretion to other land of the plaintiffs lying below high-water mark. In the Collectorate chitta of 1847, so often referred to and relied on by the appellant as supporting his objections to quantity, and to the statement in the advertisement as to the rent, this parcel of land is described as lying "on the west of the low-water of the Ganga," that is to say, being bounded on the east by the low-water mark. So that so far as the Government was concerned, the plaintiffs were entitled to hold down to the then low-water mark. But if the Government (or the Crown) granted the land down to the low-water mark—and in this case it must be presumed they have granted it, from the recognition of the right which is to be found in the chitta of 1847—the plaintiffs are entitled to all subsequent accretions. No authority has been quoted to us which supports the contention that there cannot possibly be any title in the plaintiffs to accretions to lands themselves below high-water mark. But the case of *Scrutton v. Brown* (1) is an express authority that those who have a grant of the land down to low-water mark will take all subsequent accretions. In his judgment in that case, Bayley, J., says:—"If the sea leaves a parcel of land, the piece left belongs to the person to whom the shore then belongs. The land between high and low-water marks originally belonged to the Crown, and can only rest in a subject as the grantee of the Crown. The Crown by a grant of the sea-shore would convey not that which at the time of the grant is between the high and low-water marks, but that which from time to time shall lie between those two termini. Where the grantee has a freehold in that which the Crown grants, the freehold shifts as the sea recedes or encroaches." And Holroyd, J., says:—"I am of opinion that, supposing the soil to be granted, it follows as a consequence, that the

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(1) 4 B. & C. 485.

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grantee, with respect to the shore, will stand in the same situation as the grantor would have stood if he had not executed the deed. The grantor conveyed the whole of his shore between particular boundaries: he had therefore no part of it remaining in him, and the grantee stood in his situation. Then the accretion follows as an accessory to the principal. The change being gradual, it becomes part of the shore, and belongs to the person who had the shore at the time when the accretion takes place." These principles appear to us to apply equally in this country, and exactly to meet the objection which has been raised in this case.

We think, therefore that the plaintiffs were entitled to include in their measurement all the land down to low-water mark, and that there was no mis-statement of quantity in the advertisement.

As the Collectorate chitta of 1847 showed that the revenue payable for this land to Government was fixed at Rs. 5-5-4 per biga, there seemed to be some force in the argument that there must be a substantial error in stating that the rent paid to the zemindar was only Rs. 29-9-4. Thinking it probable that the appellant might be entitled to some abatement in respect of this matter, we postponed the further hearing of the appeal, and gave the parties leave to go into evidence on this point. Evidence was subsequently given on behalf of the plaintiffs, the result of which is, that we consider it to be clearly proved that the statement in the advertisement is correct, and that no more than Rs. 29-9-7 have, for many years past, been paid; there being nothing to show that more than that sum has ever at any time been actually paid. Kasinath Biswas, one of the plaintiffs, was examined, and it would seem that, even if no better title can be proved, the tenure is at least one with a right of occupancy, which has been held by the Biswas family since 1231 (1842). It may be that the revenue payable by the zemindar to Government is Rs. 5-5-4, and that is more than the zemindar receives from his tenant, but this does not affect the question whether there was any mis-description or mis-statement as to the rent paid to the zemindar. So, the tenure may or may not be one the rent of which may be enhanced. With

that we have nothing to do at present. The plaintiffs never professed to be selling a freehold, or an unenhancheable tenure; and it was for the appellant to have satisfied himself before the sale as to the precise nature and details of the tenure. If persons, without satisfying themselves as to the real title to the property, choose to buy at sales where the party selling professes to sell merely his "right, title, and interest," such as it is, they have no one but themselves to blame if they afterwards find they do not get such a title as they could have wished. At such a sale it is before he bids, and not afterwards, that an intending purchaser should inquire into the nature of the title which the vendor can make.

We entirely concur with Phear, J., in the opinion he expresses as to the objection that the plaintiffs rescinded the contract. They clearly never did anything of the sort. They have all along pressed the appellant to fulfil it. There has been no laches or delay on their part to disentitle them from asking for a decree for specific performance. They have, in fact, never ceased to insist upon their rights as against the appellant, and the delays which have occurred, really did not arise from any laches on their part, or on the part of the Receiver.

We think that the decree appealed against should be affirmed, and that this appeal should be dismissed with costs on scale No. 2.

Decree affirmed.

Attorneys for the appellants : Messrs. *Swinhoe, Law and Co.*

Attorney for the respondents : Baboo *Dinanath Bose.*

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[APPELLATE CRIMINAL.]

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Before Sir Richard Couch, Kt', Chief Justice, Mr. Justice Kemp, Mr. Justice L. S. Jackson, Mr. Justice Markby, and Mr. Justice Ainslie.

THE QUEEN v. HARU AND ANOTHER.*

Criminal Procedure Code (Act XXV of 1861), ss. 66 & 273—Reference by District Magistrate to Subordinate Magistrate of Complaint without Previous Examination of Complainant.

A District Magistrate is not bound, on receipt of a complaint, to examine the complainant under s. 66 of Act XXV of 1861, before referring the complaint to a Subordinate Magistrate for disposal. The examination of the complainant by the Magistrate to whom the case has been referred is sufficient (1).

In this case the accused had been convicted of the offence of using criminal force. The Officiating Sessions Judge of Hooghly in a letter dated the 6th January 1872, made a reference to the High Court, under s. 434 of the Criminal Procedure Code, observing "the illegality, on account of which I have been called upon to make this reference, consists in the omission of any preliminary examination under s. 66 of the Code of Criminal Procedure. In all other respects and in all proceedings held in the presence of the accused, the procedure enjoined in the Code has been observed."

The case came on for hearing before Couch, C. J., and Ainslie, J.

The Court referred the following point for the decision of a Full Bench:—"Whether, on receipt of a complaint, the Magistrate of a district is bound, under s. 66 of the Criminal Procedure Code, to examine the complainant before referring the complaint to a Subordinate Magistrate."

In making the reference the Court observed:—

Couch, C. J.—The Officiating Sessions Judge of Hooghly has sent up the proceedings of the Magistrate in this case,

Reference to the High Court under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Hooghly.

(1) See *The Queen v. Narayan Naik*, 5 B. L. R., 680.

in order that the fine of Rs. 10, imposed on the petitioners, may be remitted, and the conviction quashed. The only alleged irregularity in the proceedings has been the omission by the Magistrate of the district to examine the complainants, under s. 66 of the Criminal Procedure Code before transferring the complaint for trial to a Subordinate Magistrate.

This irregularity was held fatal to the validity of the whole proceedings in certain cases cited by the Judge, the principal of which is that of *The Queen v. Girish Chandra Ghose* (1), in which Glover, J., delivered judgment as follows:—"In the first place he (the district Magistrate) did not record the complainant's statement before referring the case to the Deputy Magistrate, as he was bound to do under s. 66 of the Code (Act XXV of 1861). There is an order on the back of the petition making over the case, but no examination of the complainant 'reduced in to writing,' and signed by the complainant and the Magistrate." In the cases of *Dulali Bewa v. Bhuban Shaha* (2) and of *The Queen v. Mahim Chundra Chuckerbutty* (3), it has been decided that such a departure from the rules of procedure makes the acts of a Magistrate illegal. This case was followed by that of *In the matter of Iswar Chandra Koer v. Umesh Chandra Pal* (4), 30th September 1871, one of the Judges (Anslie, J.) dissenting. On the other hand, it was held, in the case of *The Queen v. Umesh Chandra Chowdhry* (5), that a transfer of a complaint

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(1) 7 B. L. R., 513.

(2) 3 B. L. R. (A. Cr.), 53.

(3) 3 B. L. R. (A. Cr.), 67, overruled by *The Queen v. Narayan Naik*, 5 B. L. R., 660.

(4) 8 B. L. R., 19.

(5) Before Mr. Justice P. B. Kemp and Mr. Justice E. Jackson.

THE QUEEN v. UMESH CHANDRA CHOWDHRY.*

The 14th June 1870.

In this case the Sessions Judge of Beerbhoom made a reference to the

High Court, under s. 434 of Act XXV of 1861, to have the sentence of the Deputy Magistrate quashed, on the ground that the Magistrate of the district, without examining the complainant, and reducing the examination into writing, and signing his name as Magistrate to such examination, referred the petition to the Deputy Magistrate for trial, contrary to s. 66 of Act XXV of 1861. In making the reference, the Sessions Judge cited as an authority the case of *The Queen v. Mahim Chandra Chuckerbutty* (a).

* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Beerbhoom.

(1) B. L. R. (A. Cr.), 67. See n. (3).

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by the Magistrate of a district to a Deputy Magistrate exercising full powers, without previously recording any examination of the complainant, was warranted under s. 66 of the Criminal Procedure Code. The first case, cited by Glover, J., does not bear materially upon the question before us. In the case of *The Queen v. Mahim Chandra Chuckerbutty* (1) Kemp, J., decided that, as a matter of fact, the Magistrate had no complaint before him, and Markby, J., concurred in this finding. It may possibly be gathered from the judgments that the learned Judges were inclined to hold that omission by the District Magistrate to record a complainant's examination, as required by s. 66, would invalidate all subsequent proceedings by a Subordinate Magistrate, to whom the complaint might be transferred; but this was not the point on which the judgments turned, so that it seems that there is really no authority, except that of the case of *The Queen v. Girish Chandra Ghose* (2), for holding the examination of the complainant before transfer of the complaint absolutely essential.

S. 273 of the Criminal Procedure Code (Act XXV of 1861), under which District Magistrates are empowered to refer complaints to Magistrates Subordinate to them, in no way defines the stage at which the transfer may be made; and s. 275 makes all rules prescribed for the guidance of the Magistrate of the district applicable to proceedings by the Subordinate Magistrate. This Court in Circular No. 6, dated 16th May 1864, paragraph 2, held that "a Magistrate may at

The Judgment of the Court on this reference was delivered by

KEMP, J.—In the case of *The Queen v. Mahim Chandra Chuckerbutty* (1) referred to by the Judge, there was a statement, but it was not such a statement as to amount to the complaint contemplated by s. 66 of the Code of Criminal Procedure.

In the case referred to us, the Magistrate sent the petition presented by the complainant to the Deputy Magistrate, who exercises the full powers of a Magistrate. We think that, under s. 66

of the Procedure Code, and the Circular Order No. 6, dated the 16th May 1864, the Magistrate of the district was justified in making over the petition to the Deputy Magistrate for enquiry and trial (a).

(1) 3 B. L. R., (A. Cr.), 67.

(2) 7 B. L. R., 513.

(a) But see *per* Kemp, J., in *Iswar Chandra v. Umes Chandra Pal*, 8 B. L. R., 19, and *per* Glover, J. (Kemp, J., concurring) in *The Queen v. Girish Chandra Ghose*, 7 B. L. R., 503

once make over the complaint to be enquired into and tried by any Magistrate subordinate to him." Such subordinate Magistrate should, in this latter case, proceed in the manner laid down by ss. 66 and 67, Code of Criminal Procedure (Act XXV of 1861).

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No one appeared for the petitioners or the Crown in this case

The judgment of the Full Bench was delivered by.

COUCH, C.J.—We are of opinion that the question referred to the Full Bench should be answered in the negative. We agree in the decision in the case of *The Queen v. Umesh Chandra Chowdhry* (1). This case was not cited in the case of *The Queen v. Girish Chandra Ghose* (2) where no one appeared to support the conviction. In the other cases the point was not decided. The examination of the complainant by the Magistrate to whom the case is referred is sufficient for the regularity of the proceedings.

(1) *Ante*, 147.

(2) 7 B. L. R., 513.

[PRIVY COUNCIL.]

P. C.*
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June 22.

PAHALWAN SINGH AND OTHERS (DEFENDANTS) v. MAHARAJAH MUHESSUR BUKHSH SINGH BAHADOOR (PLAINTIFF).

MAHARAJAH MUHESSUR BUKHSH SINGH BAHADOOR (PLAINTIFF). v. MEGHBURN SINGH AND OTHERS (DEFENDANTS).

ON APPEAL FROM THE HIGH COURT OF JUDICATURE
AT FORT WILLIAM IN BENGAL.

Accretion—Evidence—Civil Procedure Code (Act VIII of 1859), s. 7.

See also
74 B.L.R. 223.

The question whether land is formed by gradual accretion depends on evidence, but it would be an error in law to consider it as conclusive of that fact that the surface of the land had all been changed, and the marks all obliterated, so that no old houses, or trees, or mounds, or vestiges of boundary could be found, and that all the surface of the land was fresh land which had been brought down by the river.

Lopez v. Maddan Thakur (1) commented on.

Suing for new accretion after a former suit is not a splitting of action within the meaning of s. 7 of the Civil Procedure Code.

THESE two appeals were heard together.

Both appeals arose out of two suits brought by Maharajah Muhessur Bukhsh Singh Bahadoor against Pahalwan Singh and others to recover alluvial land in Pergunna Bhojpore. The first suit was decided in the Maharaja's favor on appeal to the High Court on the 20th April 1864; the second suit was commenced on the 24th September 1864, and was dismissed, on 17th April 1866 (2), on the ground that he might have included his claim in the first suit, and that therefore the suit was barred by s. 7 of the Civil procedure Code.

The first of the appeals, therefore, contested the propriety of the decision on the merits being in favor of the Maharaja, the

* *Present* :—THE RIGHT HON'BLE SIR JAMES COLVE, SIR JOSEPH NAPIER, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, AND SIR LAWRENCE PEEL.

(1) 5 B. L. R., 521.

(2) 5 W. R., 211.

second contested the correctness of holding that s. 7 applied to the second suit.

The facts are clearly stated in the judgment of the Privy Council.

The plaintiff in the original suit stated that the land in question had gradually accreted to the Maharajah's villages Kurhataur and others. The plaint stated the case as follows :—

" *Second.*—Formerly the Ganges flowed from north to south, opposite Mauzas Khurhataur, Neemiwa, Magurpora, Sirya (qu. Doomree), and other estates of the plaintiff, and west and east from a point opposite Mauza Sirya. Afterwards, on the opposite bank, the river gradually receded towards the north-east, throwing a deposit of earth on the south and west bank; and, as the land accreted to Mauza Kurhataur, Bhurahda, and Dolong (qu.), the plaintiff whose property they were came to its possession. Up to that time the river flowed north and south on the east of the then recent formation, and thence, by a zig-zag line, again flowed east and west from a point at a distance eastward of Mauza Sirya. But in 1260 F. S. (1853-54), from that very point whence it flowed east and west, it took a sudden turn, and proceeded to some distance east and north, and then having first inclined eastward turned due south by a crooked route, leaving a dry channel which still marks the former course of the river. The *diara* (alluvion) in defendants' possession is a *chuckee* (a compact mass of detached land), and the river from the north of the *diara* or north-west of the *mohana* (confluence) gradually receded, and is still receding in a north-east direction, and the accretion thereby formed towards the south-west in annexed to the estate in suit, and the plaintiff held possession thereof to the year 1266 F. S. (1858-59); inasmuch as respecting the same land the tenants of your petitioner had instituted criminal proceedings in Zilla Shahabad, and on the case being disposed of, the boundary posts were erected.

" *Third.*—On the 24th November 1859, the defendants, on the ground of the recent alluvion having gradually accreted to their estate Shewpore, applied to the revenue authorities of Zilla Ghazeepore for putting up the boundary posts, and at last succeeded in taking in the land possessed by the plaintiff within the line demarcated by the said posts. Although the land in suit is

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distinct from the defendants' *chuckes* bounded all round by a *nalla* (water channel), and the plaintiff objected at the time, yet the revenue authorities, in utter disregard of the plaintiff's right and possession, affirmed the order under which the posts were erected, and this is the cause of your petitioner's dispossession."

The case set up by the defendants was as follows:—

"*Second.*—The Ganges on the east of the settled land flows a certain distance from north to south, and thence nearing southward at a certain point takes the south-east direction, and ultimately by a zig-zag course proceeds due east. In 1258 F. S. (1850-51), however, leaving the southern channel, the river suddenly took a turn at a north-west point, and thence proceeded northward, overrunning the assessed land of Shewpore Der, belonging to your petitioners (the defendants), and having rolled down a short distance eastward, and thence proceeding by a curved route to the west, slightly inclined to the south, reached the *mohana* of the river. Again, turning thence southward, flowed due east. By this circuitous route of the Ganges, a *chuckes* was suddenly formed between the original bed and the present channel, and thus the whole of your petitioner's land at once changed position from the eastern bank of the Ganges, where it formerly was, to the west of the river, where the accretion has now formed, which has ever since continued in your petitioner's uninterrupted possession. Till the year 1261 F. S. (1853-54), the Ganges flowed in the same manner as before, *viz.*, from west to east up to the land No. 447, and thence by a straight line, with a slight curvature, proceeded further eastward, forcing through the said land and the old stream which had come to the west of the land No. 447, inclined thence southward; and, then taking due east direction, silted up, and all the alluvion thus formed on the south-west and north of the land No. 447 continued, as usual, in the occupancy of the proprietors of Shewpore Der. After this the Ganges took various turns: first, it suddenly turned eastward, and again flowed from the west to south-east by a crooked line; again from east to south, and then having inclined eastward by a circuitous route ran down due west, where, up to 1266 F. S. (1858-59), it flowed sometimes direct east, and at another time

eastward, with a little inclination to the south. Subsequently in 1267 F. S. (1859-60), the said river, which, having at first proceeded in a south-west direction, had flowed zig-zag towards the east, suddenly drew back from its western course, receded towards the east, and thence having proceeded a little southward, again flowed down due east. In consequence of the route thus described by the river, the *chuckee* in suit stood firm, retaining all the traces of numbers and boundaries, and continued, without opposition on part of any one, in the occupancy of your petitioners, the proprietors of the settled mehal, and is to this day in their possession. All these particulars will be substantiated by a reference and comparison of numbers of the land in suit, as also by a reference to the proceedings, maps, *kyfiat*, *khassra*, and various other papers authenticated by the Revenue authorities of the Zilla Ghazeepore. Under these circumstances, cl. 1, s. 4, Regulation XI of 1825 could not apply to this case; on the contrary the number and other marks being still extant, the said law will recognize the right of the proprietors of Shewpore Der to that land as good and valid. Conformably to the decision of the revenue authorities, the possession of the said proprietors was maintained, and accordingly they are in possession to this day.

"The Ganges lately broke through the land Nos. 190, 188, 183, 184, and 447; and thence, by a crooked course, flowed southward, and now it has again shifted to Nos. 183 and 184, and in its downward progress, after passing through the land No. 447, now flows eastward, and all the alluvial accretion to the north, south, and west of the land No. 447 is in the possession of the proprietors of Shewpore Der.

"*Third.*—The land in the south and north of the disputed land is in the possession of your petitioners, hence were it even admitted, according to the plaintiff's false plea, that the diluvion was by *dhooee* (washing away) still, considering the land in suit to be a part and parcel of the land Nos. 447 and 912, in the occupancy of your petitioners, none but your petitioners, under the provision of the very law quoted by the plaintiff, could be entitled to its possession, and the plaintiff has no claim whatever to its occupancy."

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The plaintiff stated in reply :—

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" Particularly this case is for lands thrown up by the Ganges ; therefore this point, namely whether the lands in dispute appertain, as an accretion, agreeably to the Regulations, to the property of the plaintiff, or in consequence of its form as a *chuckee* appertain to the villages of the defendants, depends upon the trial of the merits of the case, and on an inspection of the local and locale enquiry. With such trial the decision of the real point at issue is connected."

The issues raised were (independent of issues as to technical objections and matters abandoned at the hearing before the Judicial Committee) as follows :—

" 1st.—Whether the disputed lands have been gradually washed away, and have accreted to the estate of the plaintiff by obliteration of its former marks, or whether by the sudden change of the Ganges, they have accreted with a continuance of the former marks ? Even if gradually washed away, whether on the ground of the same being intermixed up with other lands in the possession of the defendants on the south and north of the disputed lands, the defendants are entitled to the same or not ?

" 2nd.—Whether the plaintiff, after being in possession of the disputed lands, has been ousted by the defendants or not, and whether any land, adjacent to the disputed land amongst the accreted lands, is still in the possession of the plaintiff, or whether the plaintiff was never in possession of the contested lands ?

" 3rd.—Whether the lands and their profits are according to the plaintiff's allegation, or agreeably to the statement of the defendants ?

The Principal Sudder Ameen, having taken evidence, directed an Ameen to measure and map and report upon the lands in dispute. That Ameen prepared a map (1), and furnished the following report :—

" I beg to submit that, in the case of Maharajah Muhessur Buksh Singh Bahadur, plaintiff against Meghurn Singh and others, defendants, I repaired to the locale on the 11th April 1863 ; and after Lachman Prasad, agent of the plaintiff, and Lala Ram Dutt, the defendants' agent, had made the appearance. I at first asked for the traces (*sic*) of the lands in dispute from the plaintiff's agent, and measured the same with

(1) *Ante*, facing p. 150.

a rod in use in the village, which corresponds in length, to 99 inches. On measurement, the lands in dispute, pointed out by the plaintiff, were found to consist of bigas 373-15 of land appertaining to Maza Khurhabandh, bigas 163-13-12 to Mauza Bhurahda, bigas 32-10 to Mauza Mahroly, and bigas 2,415-10-12 to Mauza Puranpoor, in all 2,985-9-4. Out of the villages in dispute alleged by the plaintiff, no village, other than Khurhabandh, does lie on its original site. The remaining villages in suit lie, on the western bank of the former river, and are within the lands newly formed, extending from north to east. The defendants pointed the land adjoining to those pointed out by the plaintiff on the west and north. The said lands were found on measurement to contain 2,032 bigas 10 dhurs. With reference to the lands pointed out by the defendants, the plaintiff's agent stated that the said lands appertained to Mauza Khurhabandh, Bhurahda, Puranpoor Mahroly, Dhobaly, Nangamuta (qu. Nugumritah), Gangol-e, and Dobba (qu. Dalna), and were held in possession by his client without dispute. Accordingly, in proof of possession, and of the appurtenances of the lands to Mauzas Nangamuta, &c., the survey maps and proceedings, &c., have been filed in heaps by the plaintiff. The places here the agent for the plaintiff marked as the bed of the river in the years 1267 and 1268 F. S. (1859-1861), and the defendants pointed out as being that in the years, 1247, 1258, 1261, 1264, and 1267 F. S. (1839-40, 1850-51, 1852-54, 1856-57, 1859-60), have been marked in the map with bare dots. But there have been found no marks of the course of the river in any of those places. The places which the plaintiff pointed out as the places where the posts were erected by the Faujdari Court, correspond with the map of that Court. On the east, therefore, lie the lands in dispute. Also on the east of the place where the defendants state that the pillars were erected by the revenue officers, the lands in dispute are situate, but they have not produced any papers to prove the erection of such posts. The defendants also aver that, within the lands in dispute alleged by the plaintiff, lie those of the numbers mentioned below, namely, from Nos. 191 to 267, No. 274, No. 275, from Nos. 440 to, 446, No. 721, No. 731, from Nos. 763 to 774, from Nos. 777 to 815, from Nos. 843 to 910, from Nos. 913 to 919, and portions of Nos. 447, 912, and 920. Accordingly, out of the said Nos., the lands included from Nos. 900 to 910, and in Nos. 919 and 920 were measured as pointed out by the defendants, but there are no marks of *arh dandar* (separating banks) to be found, that is to say, the figures of the fields as stated in the map in triangular, square, and oblong forms, &c., do no

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appear to lie within the boundaries of the lands in suit. Also there are no marks of habitation or of trees in the subject-matter in dispute,—only there are a few fir plants here and there. The lands in question (*sic*) are low; and in the *chuckes*, admitted by both parties, there are here and there babul trees, pollas and marks of separating banks of fields, as well as within wells (*sic*). The lands in question (*sic*) are high, and the earth old, and on four sides thereof the marks of the banks of the old river are traceable, I therefore beg to send the return in connexion with this report."

On the 8th July 1863, the Ameen gave the following further report:—

"To the High in Dignity.—This representation is made that, in the suit of Maharajah Muhessur Buksh Singh, plaintiff, in the names of Meghurn Singh and others, defendants, a *perwana* dated 30th June 1863 A. D. calling for a *kyfiat* (explanation) to the effect as to whether the lands pointed out by the plaintiff are pointed out according to the boundary given in the plaint, or contrary thereto, and whether the land shown by the defendants is within or without the boundaries stated in the plaint, and regarding other matters, reached me. The fact is that, according to the boundaries given in the plaint, the disputed villages were pointed out by the plaintiff: and, accordingly, they have been marked with yellow color in the map; that in the four boundaries mentioned in the plaint, the plaintiff has written direct west, &c. which, however, on comparison with the points of the compass, incline towards, that side: for instance, as on the western side of the lands of Mauza Khurhabandh, the lands of Nugumritah are written as direct west, but that lies on the north-west corner. This correctness of the points of the compass can never be made, except by the knowledge and use of the compass: and those lands which have been pointed out by the defendants as the disputed lands have been marked in green color in the map, and those lands are without the boundaries given in the plaint, and are stated by the plaintiff to be in his own possession; and those lands which have been marked yellow up to the lands which have re-formed after the institution of the suit, are the lands claimed by the plaintiff therefore the *kyfiat* asked for together with this petition is herewith sent."

On the 21st July 1863, the Principal Sudder Ameen gave judgment, the following being the material part:—

"On a reference to the deed and documents put on record by the plaintiff, and the evidence of witnesses adduced by him, and according to my

local inspection, as per details, in the proceedings dated 20th and 23rd February 1863, and by a reference to the *kyfiat*, dated 22nd June, submitted by Syad Mahomed Tural Ali, whom I had appointed Ameen, and who measured the land mentioned in the plaint, and drew out the map upon the information obtained from both parties, and also on a reference to the statement made by the said Ameen to the interrogatories put to him on the 11th July instant, and the statement of the pleaders of both parties made to the interrogatories of the Court. proposed on different dates, viz., 8th August, 25th July 1862, and 20th May 1863, I have come to the conclusion that the land in the suit is a *dhooee* gradually accreted to the estate of the plaintiff in Zilla Shahabad, and all the vestiges of the former land have been obliterated, and it does not appear to be *chuckee*, formed by a sudden turn of the river, leaving some traces of former land.

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" At the time of the local inquiry, I found no such tenants' houses cottages, or anything else denoting the remains of the land in suit, so as to show that the land in suit as formed into a *chuckee* by the river's sudden change of channel, retaining the vestiges of the former land. Had it actually been a *chuckee*, the old cottages, as alleged by defendants, and tenants' ancient houses, as deposed to by their witnesses, would have still been on it, or some marks of houses and cottages would have still been in existence, but such is not the case. Defendants' witnesses themselves have deposed that the alluvion in dispute did not form all at once. Besides, on the south of the land in dispute lies a *chuckee* the existence of which has been admitted by both the contending parties, and it is noted down in the Ameen's map. I personally inspected the *chuckee* from the beginning to the end in connexion with the disputed land, on every point of view, according as was proposed by each party severally, as per detail in the proceedings dated 20th and 23rd February, and the result of my observation is, that no such houses of tenants, cottages, or wells, as were found in the *chuckee*, admitted by both the parties, have been traced in the disputed land so as to denote the land to be *chuckee*. Under these circumstances there is not the smallest doubt in my mind that the alluvion is a *dhooee* or gradual accretion. Since, on the ground set forth above, and from a copy of the report of Roy Baldio Bax, Deputy Collector of Ghazee-pore, dated 5th July 1860 (being one of the documentry evidence adduced by the defendants,) the fact of the land in suit having accreted as *dhooee* to plaintiff's estate has been established, the defendants can by no means set up their claim in reference thereto, as it

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is obvious that the Mauzar Puranpoor, Bhurahda, and Mahroly, and some of the land of Mauza Khurhabandh, which were in plaintiff's proprietary possession, had been washed away, and formed on the opposite bank towards Zilla Ghazepore, and that in consequence of this alluvion formation across the river, and the river having formed the boundary between Zillas Ghazepore, and Shahabad, and the mauzas and lands aforesaid having appertained to Zilla Shahabad, plaintiff lost possession of the above estates and lands, but nevertheless, he continues to pay revenue to Government, in the hope that, when the said mauzas and land would again form this side of the river towards the Zilla Shahabad, he would, according to the engagement entered into with Government, regain possession of the same; because, whenever on former occasions, plaintiff's land was washed away by the river, he lost possession; and gradually as the accretion formed to his estate, he was restored to possession. In respect to plaintiff's possession of the land, west of the land in suit, extending to the land of Mauza Puranpoor, we have the confession of the defendants made to the Courts interrogatories, and the application dated 24th November 1859, filed by the defendants in the Collectorate of Zilla Ghazepore. Moreover, in the deposition of defendants' witnesses, there is this express admission that the land of Puranpoor, lying west of the land in suit, is in the occupancy of plaintiff, and that some of the land, garden &c., of Mauza Khurhabandh, still occupy their original site, and other mauzas, viz., Bhurahda and Mahroly, lie west of Puranpoor, and the land of Ku hataur on the north thereof."

The Principal Sudder Ameen accordingly ordered the plaintiff to "be put in possession of the disputed land that had been entered both in the plaint and the map of the Ameen, agreeably to the boundaries, enclosing an area of 2,957 bigas 10 biswas of land, as laid down in the plaint."

The defendants having appealed to the High Court, a Division Bench (1) on the 29th April 1864 dismissed the appeal with costs.

After reciting the pleadings, and referring to certain technical objections, the Court proceeded to consider the merits and the arguments of the appellants as follows:—

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(1) Mr. Justice Steer and Mr. Justice Kemp.

"The learned Counsel sums up his argument by submitting two points for the consideration of the Court :—

"1st.—Has the plaintiff proved that the land in dispute had gradually accreted to his estate, or does the land belong to the estate of the defendants, inasmuch as it has not gradually accreted, but has been separated from the main body of the estate settled with the defendants by sudden incursions of the river, leaving the lands cut off traceable?

"2ndly.—If the lands in dispute have gradually accreted, have they accreted wholly to the estate of the plaintiff, or to the estate of the defendants, or partly to one, and partly to the other : and if the latter, in what proportion ?

"This is a case in which the Ganges has been more than usually capricious. There can be no question that this river is the boundary between the two Zillas of Gazeepore and Shahabad. From a survey map of 1857, obtained from the office of the surveyor-General, we find that the Ganges is represented in that map as having cut off a large slice of land from Shahabad, and given it to Ghazepore. The plaintiff has unquestionably lost much land by the vagaries of the river, and it may be that his day to receive has arrived.

"The defendants have, throughout the pleadings in the Court below, taken their stand on one consistent and perfectly intelligible principle ; it is only in this Court that they have attempted to fall back, in the event of failure, on an alternative plea. Their contention below was that the disputed lands were not alluvial at all, but were what are called *chuckee* lands ; that these lands were included in the settlement made with them by the Ghazepore Collector, and that the Ganges, though it cut through the mehal settled with them, and changed its course several times, never destroyed the identity of the lands. Now the map of 1860 which professes to show the different courses which the aforesaid river had taken from time to time, also shows certain numbers as of *daghs* or plots. If those plots could be identified by comparison with any reliable chittas or other settlement proceedings, this map would be very strong, if not conclusive, evidence in support of the defendants' theory of sudden irruption by the river without destruction of identity. But it is admitted that, on a reference to the Gazeepore revenue authorities which was brought about by an application on the part of the plaintiff for copies of the *kasra* and other measurement papers, that no such papers exist, and that it is therefore clear that the tehsildar who prepared this map could not have filed in the *daghs* on the face of it by comparison with any measurement papers ; indeed the theory of

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identity by numbers is entirely destroyed by the acts and admissions of the defendants themselves, for we find them repeatedly petitioning the Collector for a remission of jumma on the score of total diluvion, and we also find a series of numbers of *daghs* given either in the body of these petitions or in lists attached thereto, which corresponds with numbers marked down in the map of 1860. It is true that the learned Counsel for the defendants has attempted to neutralise the effect of this inconsistency by stating that the admissions in these petitions were false and made for a particular purpose, *viz.* to obtain a remission of jumma; but, if this be so, we cannot permit the defendants to take advantage of this particularly as their statements to the Collector tally with the present state of things. The Ameen who made a careful local inquiry, and who was examined at great length, and cross-questioned by the parties, reports that the whole of the disputed land is alluvial land, and that there are no traces of former boundaries. The Principal Sudder Ameen who visited the spot, and remained there sometime, found the statements and map of the Ameen to be perfectly correct, and he states that he has come to a deliberate conclusion, from personal inspection of he disputed lands, that they are alluvial lands which have gradually accreted to the estate of the plaintiff in Zilla Shahabad, and that all traces of the former lands have been obliterated. We cannot but accept this result of the inquiry as the correct result; and as no distinct act of corruption or partiality on the part of the Ameen has been proved or even insinuated, his report, which has been testated by the Principal Sudder Ameen, and subjected to a strict cross-examination, may be accepted as reliable evidence under the provisions of s. 180 of the Code of Civil Procedure.

"We have therefore come to the conclusion that the river went through various changes of its channel at different times, but that these changes were gradual, and caused, as a natural consequence, alluvion; that these changes were not abrupt, leaving land capable of identification; for if such had been the case, the beds of the river, in its various changes of course, would be still traceable on the spot, which is not the case.

"With reference to the alternative plea taken by the learned Counsel for the defendants we wish to make a few observations. If the defendants had stated their case honestly, and, while admitting that the lands were alluvial lands, had claimed them under the alluvial law, either wholly or in part, we should have been prepared to give them the full benefit of the provisions of Regulation IX of 1825; but when we find them taking their stand upon a line of defence which sets up the

special provisions of cl. 2, s. 4, Regulation XI of 1825, and denouncing the averments of the plaintiff, appellant, that the lands were of gradual formation as wholly false, we must hold them to their plea; and as they have wholly failed to prove it, we dismiss the appeal with costs and interest, and affirm the decision of the lower Court."

The first appeal to the Privy Council was from that decision.

In the other case the Principal Sudder Ameen, following the principle of the decision in the first case, decided it also in the Maharaja's favor; a decision which, as mentioned above, was reversed by the High Court on the ground that the suit was barred by s. 7 of the Civil Procedure Code.

Mr. Field, Q.C., and Mr. Leith appeared for the appellants in the first appeal, and the respondents in the second.

Sir B. Palmer, Q.C., Mr. Pontifex, and Mr. Doyne appeared for the respondent in the first appeal, and Sir R. Palmer, Q.C., and Mr. Doyne for the appellant in the second.

The argument was restricted to an examination of the merits of the case, and to the applicability of s. 7 of the Civil Procedure Code to the state of the circumstances; the case of *Lopez v. Maddan Thakur* (1) was strongly pressed upon their Lordships as a decision by the Board by which this case must be governed.

Their LORDSHIP delivered the following judgment:—

This was a suit in the nature of an action of ejectment brought to recover a considerable quantity of land which was alleged to belong to the plaintiff, on account of its having been gained by accretion to four manzas which had been previously his property. Besides certain defences in point of law which have all been abandoned before us, there were two substantial defences in point of fact on the merits, which were raised by the defendants. First, they said, in substance, that the land was not gained gradually by accretion, as alleged by the plaintiff, but was what is called a *chuckes*; and after stating the facts as they alleged them to be, they summed up by saying:—"In consequence of the route thus described by the river, the *chuckes* in suit stood firm, retaining all the traces of numbers

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and boundaries, and continued without opposition on part of any one in the occupancy of your petitioners." Then they raised a second defence on the merits, by which they said :—" The land in the south and north of the disputed land is in the possession of your petitioners, hence, were it even admitted according to the plaintiff's false plea that the diluvion was by dhooee, still, considering the land in suit to be a part and parcel of the land Nos. 447 and 912 in the occupancy of your petitioners, none but your petitioners, under the provisions of the very law quoted by the plaintiff, could be entitled to its possession." Issues were formed on those pleadings. Both parties were allowed to present their issues, and then the Judge, out of the issues presented, formed those which were to be tried. The material issue was this :—" Whether the disputed lands have been gradually washed away, and have accreted to the estate of the plaintiff by obliteration of its former marks, or whether by the sudden change of the Ganges, they have accreted with a continuance of the former marks?" This issue a little confuses the matter by bringing in the marks, as if they were necessarily conclusive of the question :—" Whether the disputed lands have been gradually washed away, and have accreted to the estate of the plaintiff ;" as if it followed that, because the marks were obliterated, therefore the land had gradually accreted. The other alternative is put in the same way :—" Whether, by the sudden change of the Ganges, they have accreted with a continuance of the former marks?" Then there are further issues :—" Even if gradually washed away, whether on the ground of the same being intermixed up with other land in the possession of the defendants on the south and north of the disputed lands, the defendants are entitled to the same or not? Whether the plaintiff, after being in possession of the disputed lands, has been ousted by the defendants or not, and whether any land, adjacent to the disputed land, amongst the accreted lands, is still in the possession of the plaintiff, or whether the plaintiff was never in possession of the contested lands?" A great mass of evidence was given. The Judge in the Court below, the Sudder Ameen himself, inspected the ground on several occasions, and most careful inquiries were made on the spot as to

whether the land had gradually accreted, or whether it had been a *chuckee* suddenly formed? it was then ordered that an Ameen should draw a plan, and survey the land and present a report to the Court. That accordingly was done. He framed the plan in the suit which is before their Lordships, which shows by distinctive colors—yellow, pink, and green—the land sought to be recovered in the action, the *chuckee* which is admitted still to belong to the defendants, and land which is in the possession of the plaintiffs, but is claimed by the defendants.

Now, the questions which really arise are two; first, whether the land has gradually accreted, and how that issue ought properly to be determined; and, secondly, whether the defendants by reason of their *chuckee*, are entitled to any portion of the land, even assuming that it has accreted?

As respects the first question, it is necessary to consider, have the Courts below been wrong in point of law, or have they committed any error in fact? Now, no doubt their Lordships at one period of the argument had considerable doubt whether there might not have been a mistake in point of law; because, looking at the nature of the report of the Ameen, and of the judgment of the first Judge, and even at the form of the issues, there appeared reason to doubt whether it had not been supposed that, if the surface of the land had all been changed, and the marks had all been obliterated, so that no houses, or trees, or mounds, or vestiges of boundary could be found, and that all the surface of the land was fresh land which had been brought down by the river,—that was conclusive of the question. Now, if the Court below had meant to say that was conclusive in point of law, so that the land was to be considered as land gradually accreted, even although the channel of the river had changed, and had gone from one bed and course to another—if the Court below had meant to say that, if the marks of the old channel were obliterated, and if the marks of the land between the old channel and the new channel had also been obliterated, by reason of the water having flowed over the surface and washed off the old land, and brought new sand and mud down upon it notwithstanding there was land left between the two channels which had not, in fact, fallen into the river, and been entirely

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sunk into the channel itself,—if they meant to say that was conclusive, their Lordships would have thought they would clearly have been wrong in point of law. But upon the whole of the case it does not in fact, appear that the defendants ever substantially raised that question before the Court below at all. In their argument they appear to have assented to the framing of the issues in the way in which they were framed, and they appear to have assented to resting their case on the question whether the land which is sought to be recovered did or did not on its surface appear to be entirely new and fresh-formed, with no marks of the old cultivation and habitation upon it, or whether it had, as they seem to have alleged it had, houses and trees, and boundaries and marks of the old cultivation upon it. Certainly, when parties before their Lordships allege that a mistake has been made in point of law, if they have not raised that question in the Court below, although it is certainly open to them to raise it here, yet their Lordships ought to be very certain, indeed, that the Judge really has made the mistake imputed to him, and that the decision in fact is attributable to such mistake. It may well be that the Judges made no such mistake at all; that they perfectly understood what gradual accretion is, and what the true rule of law on that subject is, and that they meant merely to say that, as matter of fact, which no doubt was a material fact to ascertain, there were none of the marks of the old cultivation upon it which the defendants had alleged. If any marks of the old channels, or of the old houses and of the trees, and of the old mounds, could have been found, that would have been conclusive against the plaintiff, and therefore it was a matter very material to be inquired into. It did not necessarily follow, nevertheless, that because no marks were found, therefore the plaintiff had proved his case. But it does not appear that that objection was ever taken. The parties were content to rest upon the issues as framed, and it may be that they all thought, and possibly thought rightly, that under the circumstances the condition of the land would be the best evidence which could be given as to whether the land really had gradually accreted, or whether there had been a sudden change in the course of the river. Therefore their Lordships think that it

is impossible to say that either of the Courts below came to any wrong conclusion in point of law on the question of accretion.

Did they then make any mistake in point of fact? And certainly, looking at the great extent of the changes, and particularly at the maps, and some portion of the evidence, there might be some reason to doubt whether the whole of it had really accrued by gradual accretion as alleged. But their Lordships are of opinion that the case clearly comes within the rule which they have so often laid down, where the dispute turns upon matters of fact, and where the Courts below have agreed on the conclusion which they have come to respecting that fact. This was a case where a careful examination on the spot was most material towards coming to a proper conclusion on the fact. That examination was held, and apparently very carefully held, and it was after that examination that the first Court came to a conclusion in favor of the plaintiff on that part of the case. The High Court came to the same conclusion, and their Lordships are of opinion that there is certainly no such error shown in that conclusion as would enable them, or make it right and proper, to reverse or alter that decision. It may be added that the map of 1851 appears to their Lordships to show that, as respects one great change that took place in the course of the river, the effect of it was that the plaintiff got a large acquisition to his manzas, and that what he so got, which contains a large part of that colored green, and probably a small part of that colored yellow, was gained by gradual accretion. Therefore, on the whole, their Lordships think that they ought to come to the conclusion that the first material issue was properly proved and decided in favor of the plaintiff.

The case of *Lopes v. Madan Thakur* (1) was very strongly urged upon their Lordships; but their Lordships do not think that this case is at all governed by the decision in *Lopes'* case. That was a case where the river first went forward, and then, after a certain number of years, came back again, and brought to the surface the ground which had been sunk. It was held that that went back to the old owner. Here the sole question

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is, has the land, by gradual accretion, accreted to the estate of the plaintiff the defendants not having at all raised the issue that it was their old ascertainable land, swallowed up and then restored? As their Lordships are not convinced that the Courts below have erred in point of law, and as they have taken very careful means to go right, and there is nothing to satisfy their Lordships that they went wrong in point of fact, their Lordships are of opinion that their judgment on part of the case ought to be confirmed.

But there is a second very material portion of the case—namely whether the whole of the lands have really accreted on to the plaintiff's land; and certainly the map itself to the eyes of everybody who looks at it, appears to show that it is a very extraordinary conclusion that these lands have wholly accreted to the plaintiff's. Here we have on the south the *chuckee*, admitted to belong still to the defendants; the land on the other side of the river belongs to the defendants: and yet it is supposed that many hundred acres of land, in fact directly situated between the defendants' land and the river, and their land on the other side of the river, somehow or other, have accreted to some body else's estate, and not to theirs!

The Judge in the Court below, dealing with this question, deals with it very shortly, and says they cannot claim any portion of disputed land as having accreted or belonging to their land, because the river Ganges flows between them. That is in itself unquestionably an inaccurate statement. The river Ganges does not flow, at least did not flow at the commencement of the suit, or for some time previously, between them. What had happened was this. The river Ganges had originally flowed, as is admitted on all hands, at the bottom of the undisputed *chuckee*. Then, by what is admitted to have been a sudden change, a portion of the Ganges began to run above the *chuckee*, and between what is now the *chuckee* and the disputed land which is colored yellow. Now it seems quite clear, from the description of the premises, that the whole of that portion of the stream which so flowed between the *chuckee* and the land colored yellow, and in fact much of the land colored yellow itself, was then the property of the defendants. Therefore, the

whole that was there before the Ganges came was the property of the defendants. Well, then the Ganges comes there. It is not necessary, perhaps, to say what exactly the effect of that might have been on the soil covered with water. Their Lordships must not be supposed to say that that was taken away from the defendants. But, at any rate, the moment that the Ganges left that stream which it had so formed—and it certainly does not appear to have remained there above a year or two, as far as their Lordships can discover—the moment that course became a *nalla*, dry in the dry season, it appears to their Lordships quite clear (and indeed *Lopez v. Madan Thakur* (1) would be for that a direct authority) that that land which had been covered with water, when it ceased to be covered with water, became the property of the defendants. The consequence is, that the defendants were themselves the owners of the land to which the greater part of the new land accreted. It appears to their Lordships quite clear that that portion of the yellow which is *ex adverso* the *chuckee* must be taken as accreted to the *chuckee*.

As to the other portion, their Lordships think that the plaintiffs have shown that the land colored green was in their possession, and that that portion which is *ex adverso* the land colored green, has accreted to that land. The High Court on this part of the case took a view which certainly appears rather surprising, that because the defendants had mainly no doubt, and principally denied that the land had accreted at all, and had said that it had been caused by a sudden change in the river, and had not been caused by gradual accretion—that because they said that and failed, they were not entitled to rely on their second defence, which is most clearly stated in their pleadings, is most clearly stated in the issue, and is also stated in the judgment of the first Judge in the Court, below. It is to their Lordships perfectly clear that the mere fact of their having relied on their first defence could not possibly prevent them also relying on their second defence if the first defence failed. The final result is that there must be a division of the disputed land, each estate taking that which is *ex adverso* its own frontage. The carefully prepared map

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(1) 5 B. L. R., 521.

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of the Ameen (1) shows, with sufficient accuracy, how this division is to be made. Their Lordships think that, taking the point where the extreme left of the yellow at the bottom of the nalla intersects with the land colored white in the map directly below the green, a line must be drawn from that point, as nearly as may be perpendicular, to the course of the Ganges until it meets the river, and that the land which lies to the right of that, that is to say, to the south-east of it, will belong to the defendants, and that the land which lies to the north-west of it will be the only land which the plaintiff is entitled to recover in this suit.

With reference to the second suit, their Lordships think that the point on which the High Court decided that suit does not arise, because they say that the plaintiff has not recovered the whole of the lands which he might have recovered in the first suit. Now, they arrived at that conclusion from this consideration: the plaintiff, in his plaint in the first suit, specified the boundaries of the lands which he sought to recover, and he most clearly specified the boundaries towards the Ganges as being the river Ganges itself; and there can be no doubt that he sought to recover the whole of the land which he said he was entitled to up to the Ganges, but he stated also the number of bigas that there were in his plaint, according to his measurement, as 2,967. When the Ameen of the Court came to measure it, he found that there were more bigas than the plaintiff had estimated, and therefore the High Court came to the conclusion that he had only recovered the 2,967 bigas. They did not alter the judgment of the lower Court at all, but simply affirmed the judgment with costs. The High Court then comes to the conclusion that, having recovered only that quantity, [he had failed to recover the excess, which is therefore not his, and that the subsequent accretion is to that excess. It is not easy to see, if he was not to recover the whole of the land between the boundaries which he had stated in his plaint, what [portion of the land stated within those boundaries he was not to recover; and it is not very easy to see why that [portion has been taken from the land next the

(1) *Ante*, facing p. 150.

river rather than from any other portion. But their Lordships are of opinion that that is really a misconception of the true legal effect of the decree of the Court below. That decree is this:—"That a decree be given to the plaintiff, that the plaintiff obtain possession of 2,967 bigas 10 katas of disputed land mentioned in the plaint, and in the map of the Court Ameen, according to the boundaries given in the plaint." Well, now, the judgment is, that he is to recover it according to the boundaries given in the plaint. It is true it goes on to specify the quantities, but it turns out that those quantities are not strictly accurate. Then the question is which is he to recover, the quantities, or according to the boundaries given in the plaint? Their Lordships think that it must be interpreted as if it were a conveyance of land stating the boundaries, and then saying that it contains so many acres; of course, the real conveyance would be of the land within the boundaries, and it would be a mere false description that there was some slight mistake in the quantities. Their Lordships think that that principle ought to be applied to this case, because they find among the rules which prevail in the Courts in India, it is stated:—"Where the boundaries of the property in suit are required by the Code to be specified, they ought to be stated with as much precision as possible, a map being, if necessary, annexed to the plaint, or some map which has the character of a public document being referred to; but if the boundaries be set forth, the land may be decreed to the plaintiff, even though the quantity be somewhat more than that stated in the plaint" (1). Now, that is the very thing that happened here. The quantity was somewhat more than that stated in the plaint; but their Lordships think that the true construction of the decree in the first suit was, that it was a judgment for all the land contained within the boundaries stated in the plaint. That being so, the ground on which the High Court relied in the second suit, namely that there was a splitting of the suit, did not arise at all, because he has recovered in the first suit all the land which he could recover. In the result, as arrived at by their Lordships, he has not in fact recovered anything like what he

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(1) See Macpherson's Civil Procedure, 3rd ed., p 147; 5th ed., p. 79.

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has claimed. At any rate that point does not arise, because it was not correct to say that it was not necessary to bring a second suit. There was a continual fresh accretion going on during the two years which elapsed between the time when the first suit was commenced and when the second was brought. It appears to their Lordships that the second suit is substantially brought for that newly accreted land, and the decision in the second suit ought simply to follow the decision of the first. To avoid any possible misconception, their Lordships have had the line drawn on one of the copies of the Ameen's map which is to be annexed to their report, and so much of the land claimed in the second suit as lies to the north-west of the line which has been already specified, their Lordships think the plaintiff is entitled to recover in the second suit.

There will, of course, be some further question about the mesne profits; and it appears that the cases must go back to the Court below, for the purpose, first of all, of fixing the boundaries as described in the line which has been specified; and next, of finding out what are the real mesne profits according to these boundaries. There is no information before their Lordships by which it is possible that they could specify what those mesne profits should be.

As to the costs, their Lordships are of opinion that, as respects the costs in the first Court, they should be given according to what is the ordinary practice of the Courts in India as to giving costs in cases where a plaintiff recovers a portion only of the land which he claims, and there is a successful defence as respects the other portion. Their Lordships are further of opinion that, under all the circumstances, there should be no costs at all to either party, either of the appeals to the High Court, or of the appeals that have been brought to the Queen.

Their Lordships will, therefore, recommend to Her Majesty that an order be drawn up in accordance with these terms.

Their Lordships' recommendation to Her Majesty on these appeals will be that she would allow both appeals, and declare that the plaintiff in the suits (the Maharajah) is entitled to so much of the accreted land as lies on the north-west of the line drawn on the map annexed to this report, and that the defend-

ants are entitled to so much of the accreted land as lies on the south-east of that line; and that She should remit the causes to the High Court, with a direction to put the parties in possession, and to settle the amount of wasilat payable and receivable by either, in conformity with the above declaration. And declare further, that the costs of both the suits in the Zilla Court should be paid and received by the parties according to the practice of the High Court, in the proportion which the amount recovered by the plaintiff bears to the amount claimed by him, and that each party should bear his own costs in the High Court; credit to be given for any costs which have been already paid; and that there should be no costs of either appeal.

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Order accordingly.

Agent for appellant in the first appeal and respondent in the second appeal: Mr. *Wilson*.

Agents for respondent in the first appeal and appellant in the second appeal: Messrs. *Burton, Yeates, and Hart*.

[APPELLATE CIVIL.]

Before Mr. Justice Markby and Mr. Justice Ainslie.

IN THE MATTER OF THE PETITION OF S. J. LESLIE.*

1872
July 12.

Suit for Land—Act VIII of 1859, s. 5—Jurisdiction—Mortgage—Form of Decree.

A suit brought upon a mortgage praying for a decree for the amount due thereunder, and that in default of payment the land mortgaged may be sold, is a suit for land within the meaning of s. 5 of Act VIII of 1859, and is rightly brought in the Court of the district within which the land is situate.

See also
15 B.L.R. 326.
9 B.L.R. 68.

By a deed dated the 13th September 1869, S. J. Leslie, in consideration of Rs 25,000, conveyed to the land Mortgage Bank of India a house called "Fairy Hall" in Dum-Dum, in the 24-Pergunnas, by way of mortgage, and there-

* Motion on *Rule Nisi*, No. 348 of 1872.

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by covenanted to repay the said sum of Rs. 25,000, with interest thereon, at the rate of 12 per cent. per annum, and also to pay all costs and charges ; and, in default of such payment, he authorized the Land Mortgage Bank to sell the mortgaged premises, and to apply the proceeds of sale towards payment of the principal, interest, and costs. By another deed of mortgage dated the 3rd February 1871, Leslie conveyed the said house to one H. Dear, of Monghyr, to secure repayment of a sum of Rs. 2,000 and interest.

The present suit was instituted in the Court of the Subordinate Judge of 24-Pergunnas, by the Land Mortgage Bank of India, described as of 3, Mangoe Lane, Calcutta, against S. J. Leslie, described as of Calcutta, attorney-at-law, and H. Dear of Monghyr, to recover from Leslie the amount due under the mortgage, and the Revenue which the bank had had to pay to Government for the mortgaged premises, and the plaint prayed (*inter alia*) that a decree might be made for the payment by Leslie to the plaintiffs of the sum of Rs. 29,070-5-6, with interest and costs of suit ; that, in default of such payment by a time to be fixed by the Court, the property mortgaged might be sold by the Court to the highest bidder, and that at such sale the plaintiffs might be at liberty to bid for the property ; that the amount to be realized by such sale might be applied in payment of the amount to be decreed to the plaintiffs, and that if the plaintiffs became the purchasers, might be set off against the said decree ; that the plaintiffs might be at liberty to execute the decree against Leslie or his property for any balance that might remain owing ; that, in case the property be sold, all proper parties might be ordered to concur in the conveyance to the purchaser ; that a Receiver should be appointed to manage the property ; and that, if necessary, an account should be taken.

The defendant Leslie did not appear, and the Judge passed a decree *ex parte* against him, declaring that the plaintiffs were entitled to recover from him the principal sum with interest together with their costs in this suit ; and that upon payment within two months into Court of the amount of principal and interest and costs, the plaintiffs should re-convey the mortgaged premises, and in default thereof the mortgaged premises should

be put up for sale; and that, in the event of the proceeds of sale being less than the total amount of principal and interest and costs, the plaintiffs should be at liberty to execute the decree against the defendant Leslie or his property for the balance which might remain due.

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The defendant Leslie applied to the Judge under s. 119 of Act VIII of 1859, to set aside the decree passed by him, on the ground that he was a resident of Berhampore, a place about 120 miles from Calcutta; that he had not sufficient time from the date of service of summons to the date of hearing for preparing his defence. On the 12th October 1871, the Judge rejected the application. The defendant Leslie then applied to the High Court, under s. 15. of 24 & 25 Vict., c. 104, to set aside the decree of the Judge on the ground that it had been made without jurisdiction. This application was rejected by a Division Bench (Glover and Mitter, J.J.), who held that, under s. 119, Act VIII of 1859, Leslie was entitled to prefer an appeal to the High Court from the order passed by the Judge rejecting the application for re-hearing. Leslie thereupon preferred such appeal, but it was dismissed by the High Court (L. S. Jackson and Mitter, J.J.), on the ground that the defendant had failed to appear after due service of summons upon him; and the learned Judges stated that, if there was any defect in the jurisdiction which ought to have the effect of nullifying the proceedings of the Court below, that defect should be brought before the Court in the proper way.

Mr. Branson for Leslie moved the High Court (L. S. Jackson and Markby, J.J.), for and obtained a rule calling upon the Land Mortgage Bank of India, "to show cause why the decree of the Judge of the 24-Pergunnas, dated the 10th October 1871, should not be set aside upon the ground that the decree was made without jurisdiction."

The rule came on for hearing before Markby and Ainslie, J.J.

The *Advocate-General* (*offg.*) for the land Mortgage Bank, in showing cause, contended that the dismissal of the appeal from the order rejecting the application of re-hearing under s. 119, Act VIII of 1859, was final between the parties. *Ex parte* decrees can

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only be set aside under s. 119, Act VIII of 1859, and not by an application by way of motion under 24 & 25 Vict., c. 104, s. 15. On appeal the decree of the Judge was held to be valid. The Court which tried the case must be considered to have tried the question of jurisdiction—*In re Foy* (1). The defendant had been duly summoned, and without just cause failed to appear, therefore the decree was final. If the suit had been brought in Calcutta, there would have been an objection taken to the jurisdiction, as the property to be sold was in the 24-Pergunnas. The suit was one for sale in the ordinary form. The question turned upon the wording of s. 5; Act VIII of 1859 (2). The word "for" could not be construed merely in the sense "for possession of," but also meant "in respect of" land. A suit for redemption has been held to be a suit for land—*Sreemutty Lal money Dosses v. Judonauth Shaw* (3). Suits for enclosure have been considered as suits for land—*Beebee Jaun v. Meerz a Mahomed Hadee* (4) and *Blaquiere v. Ramdhone Doss* (5). It was doubtful whether an order for sale of land situate in the Mofussil could be made by the High Court in its original jurisdiction—*Denonauth Ruckhit v. Mutty Lal Paul* (6). In cases of doubtful jurisdiction, objection must be taken in time—*Bagram v. Moses* (7). This suit being for sale of mortgaged property, it was rightly brought in the Court within whose jurisdiction the property was situate—*Story's Conflict of laws*, s. 538. The decree of any other Court would not bind the property—*Story's Conflict of Laws*, s. 543. No suit for land in Calcutta could have been brought in any Civil Court in the Mofussil—Reg. III of 1793, s. 17. So much of that section as prevented the Dewanny Adawlut of the Zilla of the 24-Pergunnas from entertaining a suit against a person who

(1) 1 Tay. & Bell, 218.

(2) "Subject to such pecuniary or other limitations as are or shall be prescribed by any law for the time being in force the Civil Courts of each grade shall receive, try, and determine all suits hereby declared cognizable by those Courts, if, in the case of suits for land or other immoveable property, such land or pro-

erty shall, be situate within the limits to which their respective jurisdiction may extend."

(3) 1 I. J., N. S., 319.

(4) *Id.*, 40.

(5) Bourke's Rep., 319.

(6) 1 Hyde's Rep., 158.

(7) *Id.*, 284.

might become a resident within the limits of the town of Calcutta after the suit might be commenced, has been repealed by Act XXII of 1843, but no more. Nor could suits for land in the Mofussil against a person subject to the jurisdiction of this Court be brought in the High Court.

The question of jurisdiction cannot be raised after the order of Glover and Mitter, JJ.

Mr. Branson (in support of the rule).—The suit was for recovery of money. The decree was in the first part for money, and in the latter part relief was granted against Leske personally. S. 5, Act VIII of 1859, relates to suits for possession of land. There is a difference in the wording of s. 5, Act VIII of 1859, and the wording of cl. 12. s. 1, Act XIV of 1859. The words in the latter are "recovery of immoveable property or of any interest in immoveable property." Under s. 5, Act VIII of 1859, neither a suit for foreclosure, nor a suit for redemption, is a suit "for" land, though the decisions are the other way. The decree in a suit for land can be executed only under ss. 190, 199, 223, and 224, Act VIII of 1859. None of these sections applies to the decree made in this suit. The suit was for recovery of money by enforcing a contract; and if the money was not paid, then for sale of the land. It was not for recovery of possession if the money was not paid. The defendant was described in the plaint as of Calcutta, therefore on the face of the plaint the question of jurisdiction arose. [MARKBY, J.—Can we set aside a decree in part, part being for sale of land, and part being a personal decree?] It was so set aside in *Mannu Lal v. Pegue* (1) for want of juris-

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(1) Before Mr. Justice L. S. Jackson and Baboo Debendro Narayan Bose for the appellants.
Mr. Justice Mitter.

The 18th November 1868.

Mr. C Gregory and Baboo Ashutosh Chatterjee for the respondents.

I. D. R.
1 Cal 166.

MANNU LAL (PLAINTIFF) v. MR. T. W.

PEGUE AND OTHERS (DEFENDANTS).*

JACKSON, J.—The Courts below have

* Special Appeal, No. 1211 of 1868, from a decree of the Officiating Judge of Patna, dated 18th December 1867, affirming a decree of the Principal Sudder Ameen of that district, dated the 13th February 1867.

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diction. The decree in the case was passed wholly without jurisdiction. Even if the decree was partially good, the part which rendered Leslie personally liable was wholly without jurisdiction. (The *Advocate-General*.—We are not called on by the rule to argue that point.) The application was made on the authority of *Mahnu Lall v. Pegus* (1). The drawing up of the rule was with the officers of the Court. (The *Advocate-General*.—I came to show cause against the rule as drawn up.) As to the question of jurisdiction of this Court, see *Greesh Chunder Lahoree v. Kasheruree Dabee* (2), *Showdaminee Dossee v. Manick Ram Chowdhry* (3), *Maharaja Dhiraj Mahtab Chund Bahadur v. Shagor Kundu* (4), *In re Srimati Nassir Jan* (5), and *In re Durga Charan Sirkar* (6). Even if the decree can be upheld so far as it related to the sale of the mortgaged premises, it cannot be upheld so far as it is a personal decree against Leslie.

The *Advocate-General* in reply contended that the rule was as against the whole decree. A part of the decree could not be set aside under this rule.

The judgment of the Court was delivered by.

MARKBY, J. (after stating the rule and the plaint, continued)

held that the suit was barred by limitation. It was a suit for a sum of money to be recovered by the sale of the property pledged. The date of the bond was the 11th June 1854, and the money was payable, principal and interest, within two years from that date. In this suit, which was commenced in December 1856, the plaintiff asked both for a decree to be enforced against the person of the borrower, and also for a decision that the property pledged should be sold under the terms of the bond. The lower Court was of opinion that a suit ought to have been brought under cl. 10, s. 1 of Act XIV of 1859. It has been held in a similar case by a Full Bench of this Court—*Suriden Keston v. Shahazadeh Gholam Mahomed* (a)—that a suit in so far as it (a) 9 W. R., 170.

relates to the sale of the mortgaged property is really a suit to enforce an interest in immoveable property being a charge created on that property by the bond in suit, and that it comes within the provisions of cl. 12, s. 1, Act XIV of 1859 and not within those of cl. 19.

The decision of the lower Appellate Court is set aside, and this case will be remanded in order that a decision may be come to on the remaining issues; but of course, the plaintiff's suit, in so far as he sought for a decree against the borrower personally, was properly dismissed.

(1) *Ante*, p. 175.

(2) 8 W. R. 26.

(3) 9 W. R., 386.

(4) 5 B. L. R., App., 91.

(5) 7 B. L. R., 144.

(6) 2 B. L. R., A. C., 165.

—The mortgage-deed is not before us, but it is stated to have been a conveyance by way of mortgage, and was made in Calcutta between Europeans; it was, therefore, probably in the ordinary English form. It contained a power of sale, and a covenant for repayment of the money.

It is said that this was not a suit cognizable by the Judge of the 24-Pergunnas, because it was not a suit for land. It was contended that it was a suit upon a cause of action which arose in Calcutta, where the defendant was described as dwelling. There was some doubt whether the defendant in fact then resided in Calcutta, or elsewhere, but it was admitted that the defendant was not dwelling, or personally working for gain in the district of the 24-Pergunnas when the suit was brought: the plaintiffs however contended that the Judge of the 24-Pergunnas had jurisdiction, inasmuch as this was substantially a suit for land.

I think that the plaint, so far as it asks for a sale of the mortgaged property in satisfaction of the mortgaged debt, is a "suit for land" within the meaning of s. 15 of the Code of Civil Procedure which regulates the jurisdiction in this case. Mr. Branson contended that these words should be read as signifying those suits alone in which the land itself is sought directly to be recovered. It was admitted that a much wider construction had been put by Macpherson, J., upon the similar words of the Charter of the High Court; that learned Judge holding that a suit for foreclosure by the mortgagee was as such a suit for land, in *Bibee Jaun v. Meerza Mahomed Hadee* (1), and that a suit for redemption was so also, in *Sreemutty Lalmoney Dossee v. Juddoonauth Shaw* (2), but it was contended that these decisions were not correct. We see no reason to suppose this. They have never been questioned as far as we are aware. On the contrary, the uniform practice of this Court on its Original Side has been in accordance with them. They are also supported by the decision in *Surwan Hossein v. Shahazadah Golam Mahomed* (3), where it was held that a suit brought to enforce a security against land was a

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(1) 1 I. J., N. S., 46.

(2) *Id.*, 319.

(3) 9 W. R., 170.

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suit for recovery of an interest in immoveable property within the meaning of cl. 12 of s. 1 of Act XIV of 1859. Upon the authority of these decisions, I hold that a suit for land includes any suit in which a decree is asked for operating directly upon the land, and therefore includes any suit brought to enforce a security upon land.

It was contended, however, that this was a suit neither for foreclosure nor redemption, nor in any way to enforce a security upon land, but simply for money, to be recovered by the sale of the plaintiff's property through an attachment and sale in the usual way. This however is not so. It is perfectly well established that a decree in a suit like the present in the Mofussil Courts enables the plaintiff to sell the mortgaged property as it stood at the time of the mortgage, and clear of all subsequent incumbrances; and that such a sale completely bars redemption; whereas a suit brought simply on the provision to repay the loan will only enable the plaintiff to sell the interest which the defendant has at the time of execution. I think that we cannot upon this rule enter into any inquiry as to the origin or validity of a procedure so well established.

This being so, I hold that this is a suit for land in the same sense that a suit for foreclosure or redemption on the Original Side has been held to be a suit for land.

Lastly, it is said by Mr. Branson that the decree is, at any rate, without jurisdiction, so far as it directs execution to be taken out against the property of the defendant, other than the mortgaged property. This contention is to some extent right. The Judge had no jurisdiction to entertain a suit upon the covenant to repay. This has no connection with a suit for land; and so far as it is a cause of action, it did not arise within the 24-Pergunnas. Before, therefore, proceeding with this part of the suit, the leave of this Court should have been obtained. But then there is this difficulty in rectifying the error upon this application. The Judge of the 24-Pergunnas had authority to order the mortgaged property to be sold; he had also authority to find what sum was due from the defendant to the plaintiff upon the mortgaged security; he had also authority to order the defendant to pay costs. Now we have not the actual

decree before us, but only the minutes of the decree, and supposing the decree to be in the same terms as the minutes, the only part of the decree which relates to this portion of the suit is that which directs that, "in the event of the said purchase-money being less than the total amount and principal, interest, and costs hereby declared to be due to the plaintiffs, the plaintiffs shall be at liberty to execute the decree against the defendant or his property for the balance which may remain due." But even this part of the decree is perfectly within the District Judge's jurisdiction so far as relates to costs; and if the only balance which is now due under the decree is for costs, or if the plaintiff is only executing the decree in respect of costs, the execution proceedings which are now being carried on, and which the plaintiff desires to get rid of, are perfectly legal. And we have no materials for separating the legal from the illegal part of this portion of the decree. Indeed, this result is not at all contemplated either by the petition on which the rule is founded, or by the rule itself, which both pray that the decree may be altogether set aside; and that is the only point the Advocate-General has argued. I think, therefore, that we ought not to set aside any part of this decree, and that the rule should be discharged with costs.

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Rule discharged.

Since the above judgment, a rule has been issued upon the application of Leslie, calling upon the Land Mortgage Bank of India to show cause why the decree of the Court of the Judge of 24-Pergunnas made on the 16th October 1871 should not be set aside in so far as it directs that the plaintiffs shall be at liberty to

execute the decree for any balance that might remain due after the sale of the property covered by the mortgage-deed, and why the proceedings taken in execution of the decree in the Court of the Judge of Moorsshedabad for recovery of such balance should not be quashed.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

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July. 17.

GURU PRASAD SAHU (ONE OF THE DEFENDANTS) v. MUSSAMAT
BINDA BIBI AND OTHERS (PLAINTIFFS).*

*Civil Procedure Code (Act VIII of 1859), s. 240—Execution—Attachment—
Sale—Incumbrance pending Attachment—Right of Purchaser at Sale at in-
stance of second attaching Creditor.*

The purchaser of the right, title, and interest of a judgment-debtor in certain immoveable property at an action-sale, which took place at the instance of a second attaching creditor, was held to take the property subject to an incumbrance created by the judgment-debtor pending the first, but prior to the second, attachment, although the first attaching creditor was first paid out of the proceeds of the sale.

Whether the sale ought not to have been under the first attachment, as against which the incumbrance would have been void—*Quære*.

On the 4th September 1864, the right, title, and interest of Ajrawal Sing, in Mauza Mohanpur Pareo, was attached in execution of a decree of Gapinath and Raghubans. On the 16th March 1865, which date had been fixed for the adjudication of certain objections by the judgment-debtor, the decree-holder failing to appear, the execution case was struck off the file, but was restored on the 1st April 1865. There were various other proceedings in execution till May 1866, when the case was again struck off the file in consequence of an appeal to the Judge of Patna. The appeal was disposed of on the 24th November 1867, and a special appeal was decided by the High Court on the 24th April 1868. On the 31st December 1868, Gapinath again applied for execution of his decree, and prayed that the amount due to him might be recovered by the attachment and sale of the property already mentioned. On the 25th February 1869, the pleader for Gapinath was ordered to pay the talabana fees.

By a bond, dated 13th July 1866, an eight-anna share of

* Regular Appeal, No. 273 of 1871, from a decree of the Subordinate Judge of Patna, dated the 12th of September 1871.

Mauza Mohanpur Pareo was mortgaged by **Ajrawal Sing** to **Binda Bibi**. The bond was specially registered under Act XX of 1866. **Binda Bibi** presented a petition under the Act to recover the amount secured by the bond, and on the 21st May 1868, a decree was passed by the Subordinate Judge of Patna, whereby it was ordered that the defendants **Ajrawal Sing** and **Ramsaran** do pay to **Binda Bibi** the amount due to her from "his person and the property pledged, with interest at one per cent. per month on the principal from the date of suit to the date of payment."

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On the 26th May 1868, **Ajrawal Sing**, in consideration of Rs. 13,000, executed a deed of by-bil-wafa of the whole 16 annas of **Mauza Mohanpur Pareo** in favor of **Binda Bibi**. On the 6th February 1869, **Binda Bibi**, in execution of her decree of the 21st May 1868, caused the 16 annas of **Mauza Mohanpur Pareo** to be attached. The writ of attachment was to the following effect:—

"Claim to recover decree-money with costs. Pursuant to this day's order you are directed to attach the right, title, and interest of the judgment-debtors in the undermentioned property. * * *

"The right, title, and interest of **Ajrawal Sing**, judgment-debtor, in **Mauza Mohanpur Pareo**, **Pargunna Monir**, the property mortgaged by the bond."

On the 30th of March 1869, **Binda Bibi** presented a petition to the Court in the terms following:—

"Your petitioner prays that, when the auction-sale is held, the fact of Rs. 3,000 being due to your petitioner under the conditional sale, and Rs. 683-2-6 on account of the decree purchased by your petitioner, and the fact of your petitioner being in possession, and of the property being under attachment, be notified, so that there be no difficulty in recovering the money."

Upon that an order was made that—

"The auction-sale take place on the objections of the objectors being notified, and this case be struck off the file."

This was notified at the time of the sale as appeared from a proceeding of the Civil Court of Patna dated the 15th June 1869, in which it was stated that—

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"On the date fixed, the abovementioned property was put up for sale for the recovery of Rs. 2,012-7-8, on the conditional sale consideration-money of Rs. 13,000, stated in the deed of the 26th May 1868 in favor of the decree-holder, being notified."

On the 6th May 1869, the property was sold and purchased by Guru Prasad Sahu for Rs. 3,725, and the money was paid into Court.

Gapinath applied to be paid out of the proceeds of sale in the hands of the Court, and was opposed by Binda Bibi. The parties to the proceedings were Raghubans and Gapinath, Binda Bibi, Ramsaran, and others, heirs of Ajrawal Sing. On the 16th August 1870, the Subordinate Judge held that the mere striking the execution case off the file by the Court of its own motion, without notice to or consent of the parties, did not invalidate an attachment; and that, consequently, the attachment, in execution of the decree of Gapinath, in 1864, was in full force when the property was sold. He accordingly ordered payment of the proceeds of sale to Gapinath in satisfaction of his decree; and if any balance remained after satisfaction of Gapinath's decree, the same to be paid to Binda Bibi.

Guru Prasad Sahu was put in possession of the mauza.

Binda Bibi took proceedings under Regulation XVII of 1806 for foreclosure of her mortgage dated 26th May 1868, and caused a notice to be served on Ajrawal Sing and Guru Prasad. No money was paid by Ajrawal Sing or by Guru Prasad in satisfaction of the mortgage.

Hence the present suit by Binda Bibi for possession of Mauza Mohanpur Pareo, and for registry of her name.

The defendant Guru Prasad, in his written statement, set up (*inter alia*) that the mortgage of 26th May 1868 was void, as it had been executed pending the attachment of the property by Gapinath; that the property had been mortgaged to the plaintiff under the bond dated 13th July 1866, and was sold under a decree whereby the mortgaged property was declared to be sold in satisfaction of the debt, and as the property was sold under the attachment of the plaintiff, the whole property was passed by the sale, and not merely the right, title, and interest

of Ajrawal as it stood at the time of the attachment; and that the mortgage was collusive.

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The Subordinate Judge held that Gapinath's application for a second attachment was a clear abandonment of the first, and that no attachment had been taken out by him till March 1869; there was, therefore, no attachment in existence at the time of the execution of the mortgage of 1868. Guru Prasad had not purchased in execution of the decree of Gapinath, but in execution of the decree of Binda Bibi, consequently he could derive no title from Gapinath, nor any benefit from the attachment which had been taken out by him; the mere payment of the proceeds of sale under the provisions of s. 270, Act VIII of 1859, to Gapinath, did not convey any right to Guru Prasad under Gapinath's attachment. The mortgage was not collusive. The sale was not of the mortgaged property under the bond of 13th July 1866, the decree which declared that the debt might be realized from the mortgaged premises having been passed without jurisdiction. Besides, as the mortgage-deed of 13th July 1866 purported to convey only an eight-anna share of the property, and as the sale was of the whole property, the mortgaged premises could not have been sold, but merely the right and interest of the judgment-debtor, and consequently Guru Prasad did not acquire a higher right than that of an ordinary purchaser. He accordingly passed a decree in favor of the plaintiff.

The defendant Guru Prasad appealed to the High Court.

Baboo *Srinath Das*, *Mahes Chandra Chowdhry* and *Gopal Chandra Mookerjee* for the appellant.

Mr. C. Gregory and *Munshi Mahomad Yusaff* for the respondent.

Baboo *Srinath Das*, for the appellant, contended that the mortgage of 1868, executed by Ajrawal Sing to Binda Bibi, was void, as it had been executed at a time when the property was under

1872 attachment.—S. 240, Act VIII of 1859. *Anundalal Das v. Radamohan Shaw* (1) was applicable, as the amount raised by the mortgage did not go towards satisfaction of the decree of the attaching creditor. The sale took place under the attachment of both the decree-holders, although it was held at the instance of one only. The mere striking off of the execution proceedings did not operate as a cessation of attachment—*Rajah Mukesh Narain Sing v. Kishnanund Misr* (2). The money paid by Guru Prasad went towards satisfaction of Gopinath's decree. Supposing the sale took place under the attachment of Binda Bibi alone, she can have no right to possession, as the attachment was under a decree whereby the property was declared to be sold for payment of the debt. The purchaser took free from all subsequent incumbrances—*Pralad Misser v. Udit Narayan Sing* (3).

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Mr. Gregory contended that the decree of Binda Bibi, under which the property was sold, did not confer on the purchaser the right of the mortgagee; only the right, title, and interest of the decree-holder had been advertised for sale and not the mortgaged premises. The decree which had been obtained by Binda Bibi was, so far as it affected the mortgaged premises, passed without jurisdiction. As to the effect of such a decree, see *Ramgopal Law v. Blaquier* (4). Notice of the existence of the mortgage was given. There was no attachment subsisting at the time of the mortgage; the case had been struck off—*Khadem Hossein Khan v. Kates Pershad Singh* (5) and *Baboo Luchmesput v. Baboo Lekraj Roy* (6). The purchaser, at a sale in execution of a decree, takes only the right, title, and interest of the judgment-debtor at the time of the attachment. Therefore the defendant took the property subject to the mortgage of 1868.

Baboo Srinath Das in reply.

Mr. Gregory, with the permission of the Court, referred to *Prosumno Moye Dosses v. Wooma Moye Dosses* (7). [Собча,

(1) 2 B. L. R., F. B., 49.

(2) 9 Moo. I. A., 324: see p. 337

(3) 1 B. L. R., A. C., 197.

(4) *Id.*, O. C., 35.

(5) 8 W. R., 49.

(6) *Id.*, 415.

(7) 14 W. R., 409.

C.J.—A part of the head note ought not to have been there].

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Cur. adv. vult.

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The judgment of the Court was delivered by

COUCH, C.J. (after stating the facts, and observing in reference to the decree of 21st May 1868—"It was said that the Court, in a suit under s. 55 of this Act (XX of 1866), had not power to order, as was done here, that the money should be paid out of the property which was mortgaged: that the decree could only be for the payment of money. However, the decree was in this form, and no objection appears to have been made to it"—proceeded, referring to the order of 16th August 1870): The effect of this was, that although the sale was made under the attachment in the suit upon the mortgage to Bindu Bibi and the mortgage for Rs. 13,000 was prior to that, and would not be void as against it, yet the application of the proceeds was ordered as if the sale had really been made under the attachment of Raghubans and Gopinath. The sale should have been under their attachment as against which the mortgage for Rs. 13,000 was void, and the sale would not have been subject to it. I doubt whether the proceeding was a proper one, but we have not to determine that. The present defendant's case is this:—he says, it is true I purchased under an attachment which was subsequent to the mortgage for Rs. 13,000 in respect of which the plaintiff brings this suit, but the money which was realized from my purchase was applied in satisfying the decree of Raghubans and Gopinath, and as their attachment was previous to the mortgage for Rs. 13,000, I claim to have the benefit of it, and to have the mortgage held void as against me. Now I think the defendant is not entitled to that. The decision of this Court, which has been confirmed by the Judicial Committee of the Privy Council, upon the construction of s. 240 of the Civil Procedure Code, are that "null and void" means not null and void as against every body, but null and void as against the attaching creditor. The decision does not go beyond this, that it shall be null and void as against the attaching creditor and persons who claim under or by virtue of

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his attachment, persons making title under it. Such a question, as the present, was not before the Judicial Committee or before this Court in that case, but the principle upon which they were decided would not entitle the present defendant to have the benefit of an attachment from which he does not derive his title. It is true that the Court has ordered that the proceeds of the sale should be paid to Gapinath, but that is a matter subsequent to the defendant's purchase. The mere application of the purchase-money does not make him a purchaser under that attachment. Therefore, as regards that part of the case I think the defendant is wrong.

Then there is another question in the case with regard to the eight-anna share which was mortgaged to Bindu Bibi. Now as I have said, the decree under Act XX of 1866 authorized the sale of the mortgaged property to satisfy the debts, although wrongly, and the property was sold. Therefore Bindu Bibi, the plaintiff, is in the position of a person who has, by the process of a Court, had sold, under the mortgage, the eight-anna share. I think it must be taken that she caused to be sold all which she had a power to sell, and to give to the purchaser all which she had title to. This would give to the defendant a priority over the subsequent mortgage for the 13,000 rupees; and it is just and equitable that he should have the benefit of that, and that the present plaintiff should not be allowed, as it were, to set aside her own act in getting the property sold under the mortgage, and set up a subsequent mortgage against the mortgage to her of the eight anna share.

The result is, that the defendant is entitled to retain an eight-anna share of the property, but that the plaintiff will have a decree as prayed for in respect of the other eight-anna share. The parties will bear their own costs in both Courts.

Decree modified.

Before Mr. Justice Markby and Mr. Justice Ainslie.

PANCHANAN BOSE AND ANOTHER (DEFENDANTS) v. GURUDAS ROY
(PLAINTIFF).*

1872
July 30.

*Review—Act VIII of 1859, s. 377—Just and reasonable Causes for Delay in
filing Petition of Review—Ground of Review.*

Upon the appeal of one of the defendants to the Privy Council, the judgment of the High Court was reversed. Another defendant, whose defence was the same as that of the defendant who had appealed, applied to the High Court to review its judgment after a lapse of several years from the date of the judgment of the High Court, but within three months from the date on which he became aware of the decision of the Privy Council. The application was refused.

Batto Saran Ghosal Bahadur v. Tarini Charan Ghose (1) doubted.

THIS was a suit to recover possession of certain properties mortgaged to the plaintiff by Amirtalal Bose. These properties had been sold in execution of a decree against Amirtalal and purchased by several persons. The suit was brought against all the purchasers.

The Principal Sudder Ameen of Jessore held that the mortgage was collusive, and dismissed the suit.

On appeal, the High Court [LOCH and SETON-KARR, JJ.], on the 5th December 1864, held that the mortgage was genuine. They, accordingly, passed a decree in favor of the plaintiff.

Umesh Chandra Roy, one of the defendants, appealed to Her Majesty's Privy Council. On the 24th November 1871, the Judicial Committee of the Privy Council reversed the judgment of the High Court, and affirmed the judgment of the Principal Sudder Ameen.

Panchanan Bose, one of the defendants, applied to the High Court [MARKBY and AINSLIE, JJ., (2)] for a review of judgment upon the following grounds:

1. That the judgment of this Hon'ble Court, dated the 5th December 1864, having been set aside by her Majesty's Privy

* Application for Review of Judgment passed by Loch and Seton-Karr, JJ. in Regular Appeal, No. 271 of 1864, on the 5th December 1864.

(1) 3 B. L. R., A. C., 287.

Karr, J., had ceased to be a Judge of

(2) Loch, J., was on leave, and Seton-

the High Court,

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Council on the 24th November 1871, on the appeal of Baboo Umesh Chandra Roy, and the deed of mortgage propounded by the plaintiff found to be fraudulent and collusive, your Lordships should reverse the judgment by which the decision of the Principal Sudder Ameen, dated the 25th April 1864, was set aside.

2. That as your petitioner's plea and defence to the suit was the same as that of Baboo Umesh Chandra Roy, the mere fact of your petitioner not having appealed to Her Majesty in Council on account of the valuation of his share of the property being under Rs. 10,000 ought not to prejudice his rights.

3. That your petitioner became aware of the Privy Council ruling some time in May last, hence the delay in the application.

Baboo *Durgamohan Das*, for the petitioner, contended that the application was within time, the decision of the Privy Council having come to the knowledge of the petitioner only in May last—*Satte Saran Ghosal Bahadur v. Tarini Charan Ghose* (1). [AINSLIE, J.—The application is after such a lapse of time that the property may have changed hands upon the faith that the decree of the High Court was final.] In point of fact the property has not changed hands. As the defence of the petitioner was the same as that of Umesh Chandra Roy, the petition should be allowed.

The judgment of the Court was delivered by

MARKEBY, J.—This is an application under s. 376 of the Civil Procedure Code, for admission of a review of a judgment passed in the year 1864 by two Judges of this Court, of whom one is no longer a member of the Court, and the other is absent in England.

S. 377 provides that "the application shall be made within ninety days from the date of the decree, unless the party preferring the same shall be able to show just and reasonable cause, to the satisfaction of the Court, for not having preferred such application within the limited period."

(1) 3 B. L. R., A. C., 287.

Now it appears that a suit was brought against the present applicant and four other defendants, and in respect of twelve or thirteen different properties; this applicant being concerned only with one. The main point in dispute was whether a certain deed, under which the plaintiff claimed—how is not now material—was fraudulent and collusive; and the first Court dismissed the plaintiff's suit, finding the deed to be so. On the appeal of the plaintiff, in which all the defendants were made respondents, this Court found the deed genuine. Thereupon one of the defendants, appealed to the Privy Council the present applicant and the other defendants not joining in the appeal; and the Privy Council has now reversed the judgment of this Court, and has affirmed the decree of the first Court: and the result of the appeal to the Privy Council is the only ground laid before us as the "just and reasonable cause" why the application was not made within ninety days. If we were to grant this application, and were ultimately to admit the review, we should have to re-hear the appeal from the decision of the first Court, and consider whether or no we would affirm it; and obviously the object of this application is that, upon the question of fact on which the decision has hitherto turned, we should alter the decision of the two Judges who decreed the appeal in 1864, by deciding in conformity with the decision of the Privy Council. Of course this present application assumes, and therefore we assume it also, that the decision of the Privy Council, which we have not seen, does not apply to the present applicant; and this Court would then have to consider how far the decree of the Privy Council, upon a matter of fact between other parties, was conclusive when the same question of fact came before this Court in another case. But it seems to me that we ought not to put this Court on any such embarrassing enquiry. I do not consider that any "just and reasonable cause" for the delay has been shown in this case; in fact, I do not think that any cause at all has been shown. It was open to the defendant, had he so chosen, to appear as an appellant before the Privy Council. There was but one suit, and he was a party to that suit, and the whole suit was carried before the Privy Council, and he had a right to appear in it; and

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if in consequence of not doing so, he has lost the benefit of the Privy Council decision, he has only himself to blame.

We are referred to a decision of *Kemp and Glover, J.J.*, in *Satto Saran Ghosal Bahadur v. Tarini Oharan Ghose* (1). But in that case it appears that there were five separate suits, not one only, and one only was of the value which gave the party a right of appeal to the Privy Council. That alone is sufficient to distinguish that case from the present. But apart from that, it seems to me that it would give rise to considerable confusion and great inconvenience, if suits, which were considered to have been finally disposed of, could be opened by review after the lapse of several years from the date of decree, upon the ground that in some other suit the Privy Council had come to a different decision. I think there is great force in the observation thrown out by Ainslie, J., in the course of the argument, namely, that in the years which have elapsed since the decree was given, the property may have been dealt with on the faith that the decree of this Court was a final one. If, therefore, I was called upon to say whether I concurred in the decision referred to, in *Satto Saran Ghosal Bahadur v. Tarini Oharan Ghose* (1), I should, with the greatest respect for the two Judges who passed it, have considerable hesitation in saying that I do so.

Application refused.

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July 11.

Before Sir Richard Couch, Kt. Chief Justice, (Mr. Justice Bayley, Mr. Justice Markby, and Mr. Justice Ainslie.

IN THE MATTER OF THE APPEAL OF DULI CHUND.

Bengal Civil Courts Act (VI of 1871), s. 22—Appeal—Subject-matter in Dispute—Jurisdiction of the High Court.

The appeal from the decree or order of a Subordinate Judge or Moonsif, where the amount or value of the subject-matter in dispute in a suit exceeds Rs. 5,000, lies to the High Court, although the amount or value of the subject-matter in dispute in appeal is less than Rs. 5,000.

MATTER referred for the opinion of the First Bench by the Deputy Registrar:—

(1) 3 B. L. R., A. C. 287.

"This appeal is against the portion of the decree of the Subordinate Judge of Gya, dated the 22nd February 1872, which disallowed the claim in suit, to the extent represented by the amount at which this appeal is valued, viz., Rs. 3,675; the entire claim being Rs. 7,935.

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"With reference to each of three similar appeals, the Fourth Bench has to-day held that, 'under s. 22, Act VI of 1871 (1), the appeal ought to have been preferred in the Court of the District Judge, inasmuch as the subject-matter in dispute does not exceed Rs. 5,000 in value,' and directed 'the case' to 'be sent down to the District Judge.'

"But for this order, the officer would have received this appeal under the impression that the terms, 'the amount or value of the subject-matter in dispute,' used in s. 22, Act VI of 1871, are synonymous with the terms, 'suits exceeding the amount or value,' used in s. 4, Act XXV of 1837 (2), which have been re-enacted first by Act XVI of 1868, s. 18, (3), and next by the more recent Act of 1871 above quoted.

"Under the circumstances, however, I must refer the appeal to the First Bench, to which the district it has come up from:

(1) *Act VI of 1871, s. 22.*—"Appeals from the decrees and orders of Subordinate Judges and Munsiffs shall when such appeals are allowed by law, lie to the District Judge, except where the amount or value of the subject-matter in dispute exceeds five thousand rupees, in which case the appeal shall lie to the High Court."

(2) *Act XXV of 1837, s. 4.*—"And it is hereby enacted that in all suits exceeding the amount or value specified in clause 1, section 18, Regulation V, 1831, which shall, under the authority of section 1 of this Act, be referred to a Principal Sudder Ameen the appeal from the decision of such Principal Sudder Ameen shall be direct to the Court of Sudder Adawlut and it shall be conducted in all respects according to the same rules as if it were an appeal from the decision of a Zillah Judge to the said Court of Sudder Dewanny Adawlut, and any application for a review of judgment on such decision shall be made by the said Principal Sudder Ameen directly to the said Court of Sudder Dewanny Adawlut, and shall be conducted in all respects as if it were an application for a review of a decision of a Zilla Judge."

(3) *Act XVI of 1868, s. 18.*—"In suits decided by any Subordinate Judge in the exercise of his original jurisdiction, of which the amount or value of the subject-matter does not exceed rupees five thousand, an appeal shall lie to the District Judge to whose control such Subordinate Judge is subject. In all other suits decided by any subordinate Judge, whether in the exercise of his original or appellate jurisdiction, the appeal from the decision of the Judge shall be direct to the High Court."

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indicates it to belong, for orders as to its admission or otherwise."

In consequence of the decision of L. S. Jackson and Markby, JJ., in *Srimati Dasi v. gaudamini Dasi* (1), this case and cases Nos. 244, 199, and 260 were referred to a Bench of four Judges.

The circumstance of case No. 244 were the same as those in the case referred by the Deputy Registrar. Cases Nos. 199 and 260 were cross-appeals; the value of the suit was above Rs. 5,000, and a decree had been passed in favor of the plaintiff for Rs. 2,916.

(1) Before Mr. Justice L. S. Jackson and
Mr. Justice Markby.

SRIMATI DASI AND ANOTHER (DEFEND-
ANTS) v. SAUDAMINI DASI (PLAINT-
IFF)*

The 28th May 1872.

THIS was a suit brought to recover possession of lands valued at Rs. 7,926, and mesne profits valued at Rs. 12,343. Upon the objection of the defendants as to the over-valuation of the suit, the Subordinate Judge found that the fair valuation of the lands in dispute would be Rs. 2,500, and that the mesne profits for six years would be about Rs. 4,417, making Rs. 6,917 as the amount of the claim. He accordingly fixed Rs. 6,917 as the valuation of the suit.

On the merits he found in favor of the plaintiff, and passed a decree for the plaintiff to recover possession of all the lands described in the plaint, with wasilat from the date of suit to the date of delivery of possession in execution, which was thereby reserved to be ascertained in execution of the decree.

The defendants appealed to the High Court, valuing the appeal at Rs. 2,500.

On the appeal being called on for hearing, JACKSON, J., observed:—The matter in dispute now is Rs. 2,500. The appeal does not lie here.—S. 22, Act VI of 1871.

Baboo Nilmadhab Bose (Baboo Bamecharan Banerjee with him), for the appellant, contended that the suit was valued at above Rs. 5,000. This section relates to the "subject matter in dispute" in the suit, not to the subject-matter in appeal. When the suit is for recovery of possession of land and mesne profits valued at a sum above Rs. 5,000, the appeal lies to this Court. [JACKSON, J.—We have to do with the appeal only. The words of the section are "subject-matter in dispute."] The suit was brought on the 27th January 1871 before the Act was passed, and consequently the appeal is governed by the old law and practice. [JACKSON, J.—The Act came into operation on the 10th February 1871, and before the appeal. We have to do with the appeal only. The appeal was by mistake filed here.]

Baboo Nilmadhab Sen for the respondent was not called upon.

JACKSON, J.—Under s. 22 of Act VI of 1871, the appeal ought to have been preferred in the Court of the District Judge, inasmuch as the subject-matter in dispute does not exceed Rs. 5,000 in value.

The case must be sent down to the District Judge.

*Regular Appeal, No. 281 of 1871, from a decree of the 2nd Subordinate Judge of the 24-Pergunnas, dated the 27th September 1871.

Baboo *Nilmadhab sen* for Duli Chund.

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Mr. *Woodroffe* (Mr. *C. Gregory* with him) for the appellant in case No. 244.

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Mr. *Allen* for the appellant in case No. 193.

Baboo *Annada Prasad Banerjee* for the respondent in case No. 244.

For the appellants it was contended that s. 22 Act VI of 1871, referred to the "subject-matter in dispute" in the original suit, and not to the "subject-matter in dispute" in appeal. The words are the same as in s. 20, which relates to original jurisdiction, the subject with which the chapter at the commencement deals. The practice under the former Act (XVI of 1868) was to prefer appeals to the High Court in suits valued at a sum exceeding Rs. 5,000, even though the decree were for less than Rs. 5,000. The purpose of Act VI of 1871, as stated in the preamble, is to "consolidate and amend the law relating to the District and Subordinate Civil Courts." The effect of s. 22, Act VI of 1871, and of s. 18, Act XVI of 1868, is the same. An appeal to the Privy Council is admissible in a case where the suit is valued at above Rs. 10,000, although the portion of the property to which the appeal relates is below that value—*Onooroop Ohunder Mookerjee v. Pertab Chunder Paul* (1). According to the ruling in *Srimati Dasi v. Saudamini Dasi* (2), if the value of a suit were above Rs. 10,000, and a decree were given for Rs. 2,000, the appeal would lie to the District Judge, but he would have no power to try a cross-appeal if the plaintiff preferred one in respect of the remaining Rs. 8,000. If in a suit for Rs. 50,000, a decree were passed for Rs. 2,000, only, the appeal by the defendant would lie to the Judge. If the appeal were decreed, and the question were one of fact, no special appeal would lie to the High Court. If the plaintiff appealed in respect of the Rs. 48,000, and the appeal were decreed, in that case there would be two decrees upon the same question; one allowing, and the other disallowing, his claim.

(1) 6 W. R., Mis., 4.

(2) *Ante*, p. 192.

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Also, suppose a case where the plaintiff sued for (say) Rs. 6,000, and obtained a decree for (say) Rs. 3,000, the defendant appealed, and the plaintiff also appealed: if the Judge dismissed the appeal of the defendant, and decreed that of the plaintiff, and the defendant appealed to the High Court, that Court would be entertaining a special appeal in respect of a sum exceeding Rs. 5,000, whereas Act VI of 1871 provides that, when the amount or value of the subject-matter in dispute exceeds Rs. 5,000, it is to be the subject of regular appeal to the High Court.

In regard to cases Nos. 199 and 260, it was also contended that even if it be held that the words "subject-matter in dispute" relate to the appeal, they ought to be construed as the subject-matter in dispute at the time of the hearing of the appeal, and not at the time of filing. The opposite party might prefer his cross-appeal at the hearing of the appeal—*Luleet Singh v. Mirza Ali Reza* (1). Unless the opposite party expressly abandoned his right to a cross-appeal, it could not be said what the subject-matter in dispute in appeal might be.

For the respondent it was contended that the whole question depended upon the construction of s. 22 Act VI of 1872. The old practice was under s. 4, Act XXV of 1837. The words were clear. S. 18 Act XVI of 1868, laid down the general law that all appeals would lie to the High Court, the exception was where the value of the suit was below Rs. 5,000. The language of s. 22, Act VI of 1871, is different. The appeal will lie to the District Judge, except where the subject-matter in dispute exceeds Rs. 5,000; in that case the appeal shall lie to the High Court. S. 22, Act VI of 1861, does not refer to suits, but to appeals only. Ss. 19 and 20 relate to the original jurisdiction of the lower Courts. Ss. 21 and 22 treat of appeals, and not of original suits. *Onooroop Chunder Mookerjee v. Pertab Chunder Paul* (2) does not apply to the present question. Act VI of 1871 is not only "to consolidate," but also to "amend." It is an Act for laying down and defining the jurisdiction of the several Courts. The word

(1) 8 W. R., 322.

(2) 6 W. R., Mis., 4.

"suit" cannot be imported from another section when s. 22 treats of appeals only.

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COUCH, C.J.—The question which is raised in this case is whether, where the original suit is brought for a sum exceeding Rs. 5,000, or for property exceeding that value, and the decree is for a less sum, or for property of less than that value, the appeal is to lie to the District Court, or to this Court.

Before the passing of Act VI of 1871, there was no doubt that, in such a case, the appeal lay to the High Court. The words of s. 18, Act XVI of 1868 (1), which was then the law, and which was only a continuation of the law, as it was previous to the passing of that Act, are very clear; (*reads*). Act VI of 1871 is entitled an Act to consolidate and amend the law relating to the District and Subordinate Civil Courts in Bengal, and it recites that it is expedient to consolidate and amend the law relating to the District and Subordinate Civil Courts. Although it purports to be an amending Act, and such an alteration in the law as this would be with respect to the right of appeal may be considered by some persons an amendment, I think so important an alteration ought not to be held to have been made by the Legislature, unless the language used in the Act shows a clear intention to make it. Now s. 22 of the Act, upon the construction of which the question depends, is one of several sections which begin by defining the extent of the original jurisdiction of the District Judge, or the Subordinate Judge. S. 19 provides that the jurisdiction of a District Judge, or Subordinate Judge, extends to all original suits cognizable by the Civil Courts; then s. 20 declares that the jurisdiction of a Munsiff extends to all like suits in which the amount or value of the subject-matter in dispute does not exceed Rs. 1,000. S. 21 provides that appeals from the decrees and orders of District Judges and Additional Judges shall, when such appeals are allowed by law, lie to the High Court; and then s. 22 says:—"Appeals from decrees and orders of Subordinate Judges and Munsifs shall, when such appeals are allowed by law, lie to the District Judge,

(1) *Ante*, p 191.

[ORIGINAL CIVIL.]

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June 6 & 7 &
July 26.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Markby.

DWARKANATH BYSAK AND OTHERS (PLAINTIFFS) v. MAHENLRA-NATH BYSAK (ONE OF THE DEFENDANTS.)

Hindu Law—Inheritance—Lunatic—Incurability.

In order to exclude a person from inheritance under the Hindu law on the ground of insanity, it is sufficient to show that, when the succession opened, he was mad and not in a condition to perform the funeral oblations. Proof that his insanity was incurable is not necessary.

THIS was an appeal from the decision of Macpherson, J. dated 5th April 1872, in a suit brought by the present appellants against one Dinabandhu Mullick and the present respondent.

The material facts of the case were as follows:—Rasik-lal Bysak died in 1821, leaving a widow and three sons, Rajnarayan, Rajkrishna, and Jaykrishna. The sons continued to live as a joint Hindu family until the death of Rajkrishna in 1826, Rajkrishna Bysak died without issue, but leaving a widow. S. M. Upurba Chandra Dasi, who in 1828 instituted a suit in the Supreme Court, praying for a declaration of her right to the share of Rajkrishna Bysak in the joint property belonging to him and his two brothers, and for an account and partition. On the 4th March 1829, there was a decree for partition with a declaration of Upurba Chandra Dasi's right as a Hindu widow to a one-third share of the joint estate. In 1832, the commission of partition was returned, and the properties,

continuation of the original suit, and we do not think that, in determining the venue of appeal, we should take into consideration the interest which accrued subsequently to the date of the decree. It is true that the question directly decided by the Full Bench was somewhat different from the one we have now to determine, but the principle appears to

us to be the same, the only difference between the Full Bench case and this case being that the former related to an appeal from an original decree, whereas the present case arises out of an appeal against an order passed in execution.

We reverse the decision of the Judge below, and remand the case to him to try it on the merits.

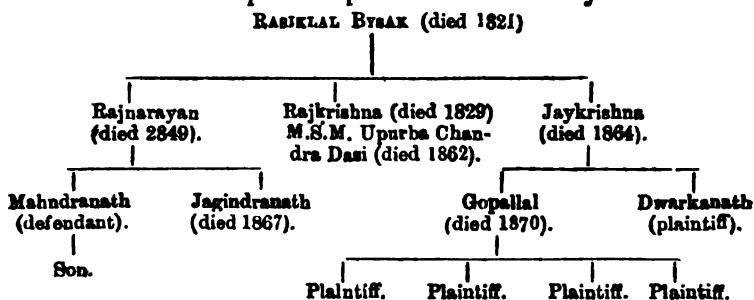
the subject of this suit, were (among others) allotted to Upurba Chandra Dasi, who thereupon obtained possession. In 1834, Templeton, an attorney of the Supreme Court, who had acted for Upurba Chandra Dasi in her suit, caused certain property belonging to her, among which was the property now in dispute, to be seized and sold in execution of two judgments, which he had obtained against her. He himself purchased the property, and in April 1834, the sheriff conveyed to him Upurba Chandra's right, title, and interest. In August 1834 Templeton conveyed the property to one Gurudas Dutt by deeds of lease and re-lease, which recited that Templeton was seized in fee. Gurudas Dutt had a brother, Shamaldas Dutt, who was joint in estate with him; and on a partition being made between the brothers, the properties in dispute were allotted to the latter, and, upon his death, came into the possession of his son, Rajendra Dutt. In a suit brought against Rajendra Dutt, an order was made on 27th September 1861, that these properties should be sold, and that Carapiet, the attorney for Rajendra Dutt, should be trustee for sale; and the parties were ordered to bring in all the deeds necessary for the purposes of the sale, and to join in the conveyance. Rajendra Dutt thereupon handed all the title-deeds to Carapiet, and amongst others the deeds of conveyance from the sheriff to Templeton. Carapiet, in advertizing the property for sale, inserted the following condition:— "The title commences with the indentures of lease and re-lease, bearing dates respectively the 21st and 22nd days of August 1834, and no evidence of title prior thereto shall be required by the purchaser or purchasers." The sale took place on the 14th December 1861, and Dinabandhu Mullick, one of the defendants in the Court below, became the purchaser, and the deeds from Templeton to Gurudas Dutt, but not those from the sheriff to Templeton, were handed to him. In January 1862 the conveyance was executed, and subsequently Dinabandhu Mullick got possession. Rajnarayan Bysak died in 1849, leaving two sons, the defendants Mahendranath and Jagindranath. Mahendranath became insane in 1853, and on the 20th August 1854, his wife was appointed committee of his estate and person. Jagindranath died about 1867, leaving a daughter, who, together with her

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infant son, was alive at the date of this suit. Jaykrishna Bysak died about 1864, leaving two sons, Gopallal and the plaintiff Dwarkanath. Upurba Chandra Dasi died on the 26th October 1869, and Gopallal Bysak died in 1870. The following table shows the relationship of the parties to Rasiklal Bysak :



The present suit was instituted by Dwarkanath Bysak and the four sons of Gopallal Bysak, against Dinabandhu Mullick and Mahendranath Bysak, it being contended that the latter was incapable of inheriting on account of his insanity. The plaintiffs prayed that they might be declared entitled to the estate of Rajkrishna Bysak, and that the defendant Dinabandhu Mullick might be ordered to give them possession thereof, or, if it were held that they were not entitled to the whole of the said estate, then that their rights and those of the defendant Mahendranath Bysak therein might be ascertained and declared, and that the defendant Dinabandhu Mullick might be ordered to give them possession of the share to which they might be declared entitled, and for mesne profits since the death of S. M. Upurba Chandra Dasi.

A summons had been served on the committee of the lunatic defendant, Mahendranath Bysak, but no one appeared on his behalf.

At the trial Dr A. J. Payne, superintendent of the Lunatic Asylum at Bhowanipore, gave the following evidence as to the mental condition of the defendant Mahendranath Bysak :—
 “ I know a patient there (in the Lunatic Asylum), Mahendranath Bysak. His present—his third—admission was in October 1862. I was then at the Asylum. His state varied a good deal. At times he was insane, at others rational. His lucid intervals grew rarer, and there has been no evidence of suspension of insanity for years. I have had considerable experience. I do not consider his a curable case ; there is no possibility of his being curable.

I had no hopes of his recovery from a year after his admission into the asylum."

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MACPHERSON, J. (after stating the facts of the case, and remarking that he thought the defendant Dinabandhu Mullick had entirely failed to show that the transfer to him was valid against the plaintiffs, proceeded)—The question then arises as to the defendant Mahendranath Bysak, who is admittedly entitled to a share, but for the fact of his being a lunatic. He was not born a lunatic, and was not formally found to be a lunatic till 1864. His position depends on this question, *viz.*, whether, at the time of Upurba Chandra's death in October 1869, he was incurably insane. The evidence is that, though not born insane, he had attacks of insanity from time to time, which gradually increased in frequency and intensity. He was more than once an inmate of the Lunatic Asylum here, and was finally admitted into the Asylum in 1862 and has remained there ever since. After 1862 he had lucid intervals. As Dr. Payne says he was at times perfectly insane, and at times tolerably rational: the lucid intervals grew less and less frequent, and for a good many years past have disappeared altogether. Dr. Payne is distinctly and decidedly of opinion that he is now incurably mad. Without in any way doubting the value of Dr. Payne's opinion, formed as it is after many years of observation of the patient, I am not prepared to find as a fact that Mahendranath Bysak was, in October 1869, absolutely incurably insane within the meaning of the Hindu law, so as to be incapable of inheriting. He has a wife, and he having once (and even comparatively recently) admittedly been sane, and the malady with which he is afflicted having grown upon him, I should not be justified in declaring him absolutely incurable, unless he were conclusively and positively proved to be so.

Taking this view of Mahendranath's position, it is unnecessary for me to decide the question discussed by Mr. Marindin at some length as to whether insanity, if not from birth, makes a man incapable of inheriting.

The plaintiffs are entitled to a decree declaring their right as

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next heirs of Rajkrishna to this property. When Upurba Chandra Dasi died, the next heirs were Mahendranath (the son of Rajnarayan) and Gopallal and Dwarkanath (the sons of Jaykrishna), who each took one-third. Gopallal having died, those plaintiffs who represent him are now entitled to his one-third. I shall declare accordingly, and I shall order possession to be given to them. The defendant Dinabandhu must pay the plaintiffs' costs on scale 2. Under the circumstances there will be no account of mesne profits. Mahendranath Bysak's share is not liable for any portion of the costs of this suit, one chief object of which was to have him declared incurably insane.

The plaintiffs applied for a review of judgment, on the ground that their Counsel abstained from examining Dr. Payne as to the particular nature of the insanity of the defendant Mahendranath Bysak, and the grounds of his opinion that the disease was incurable, only because the correctness of that opinion appeared to be unquestioned by the learned Judge; and that if Dr. Payne had been further examined, he would have given material evidence to prove that the defendant Mahendranath was an incurable madman within the meaning of the Hindu law. The application was based upon an affidavit of Dr. Payne in which he reiterated his opinion that Mahendranath Bysak was incurably insane, and stated the reasons upon which his opinion was founded.

MACPHERSON, J., refused the application.

The plaintiffs thereupon appealed against the judgment so far as it declared the defendant Mahendranath Bysak entitled to a one-third share of the property of Rajkrishna Bysak, and also against the order refusing their application for a review. The grounds of appeal were:—

1. That the learned Judge ought to have held that the defendant Mahendranath Bysak, at the time of Upurba Chandra's death, was a madman incapable of inheriting according to Hindu law, and that the plaintiffs alone were the next heirs of Rajkrishna Bysak.

2. That, if the learned Judge was right in holding that there was not sufficient evidence that the defendant Mahendranath Bysak was a madman incapable of inheriting, he ought to have granted a review; and

3. That, if the learned Judge was right in holding that the defendant Mahendranath Bysak was entitled to a share in the estate of Rajkrishna Bysak, he ought to have held such share chargeable with a proportionate share of the attorney and client costs of the plaintiffs.

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Mr. *Kennedy* for the appellants.

Mr. *Lowe* for the respondent.

On the hearing of the appeal, Mr. *Lowe* informed the Court that the respondent had a son living at the date of Upurba Chandra's death, and who was still alive. This was admitted, and the argument proceeded as if the son had been made a party (1).

Mr. *Kennedy*.—The respondent, if sane, would undoubtedly have been a co-sharer, but in any event he ought not to share the benefit without bearing the burden, i. e., paying a proportionate share of the costs. I submit, however, that upon Dr. Payne's evidence, the learned Judge ought to have found him incurably insane. There may indeed be some doubt whether incurability is a necessary element. The *Dayabhaga*, Ch. V, sl. 10, is silent on this subject, but the *Mitakshara*, Ch. II, s. 10 sl. 7, evidently contemplates the possibility of cure; so does the *Vyavahara Mayukha*, Ch. IV, s. 11, sl. 2. The state of medical science among the ancient Hindus rendered it impossible for them to assert that any disease was incurable. The reason for excluding the lunatic from inheritance is his incapacity to perform the funeral rites—*Dayabhaga*, Ch. V, sl. 7; see also Ch. V, sl. 18. The rule that, under certain circumstances, the son of a disqualified person may inherit refers to the case in which the disqualified person is himself a son or grandson of

(1) The question of the son's right to succeed to his father's share is not noticed in the judgment.

1872 the deceased—Dayabhaga, Ch. V, sl. 11. According to Hindu law, the brother's sons would, on Upurba Chandra's death, be heirs of Rajkrishna ; but if Mahendranath had been dead at that time, his son would not have inherited. The lunatic is civilly dead, he exists only for maintenance. Mahendranath's lunacy therefore has the same effect as his death would have had, i. e., it excludes his son. In *Kalidas Das v. Krishna Chandra Das* (1), Peacock, C.J., clearly expresses his opinion that the son is entitled to take only where, if his father were dead, he would take as heir : " he does not inherit from every one who dies but only from every one of whom, according to the laws of inheritance, he is heir." [Couch, C.J.—That was not the point decided by the Full Bench.] No. but the judgment proceeded on the assumption that the law is as I state it ; see the Mitakshara, Ch. II, s. 10, sl. 9. If, at the time of Upurba Chandra Dasi's death, both Gopallal and Dwarkanath had been dead, the lunatic Mahendranath could not have excluded their sons. Except, in the case of lineal descent, anything like representation or quasi-substitution is unknown in Hindu law ; and even in the case of lineal descent, it is known only to a limited degree. In collateral succession the nearer relative excludes the sons of others ; lineal descendants take *per stirpes* ; but in all cases of collateral descent, the succession is *per capita*. The case of *Braja Bhukan Lal Ahusti v. Bichan Dobi* (2) is a direct decision on the point of representa-

(1) 2 B. L. R., F. B., 103 ; see p. 169. Munshi Mahomed Yusaff for the appel-

(2) Before Mr. Justice Bayley and Mr Justice Kemp.

Mr. R. T. Allen and Baboos Annada Prasad Banerjee and Nil Madhab Sen for the respondents.

BRAJA BHUKAN LAL AHUSTI v.
BIOHAN DOBI AND ANOTHERS.*

The 16th September 1870.

Baboo Anukul Chandra Mookerjee
and Mahes Chandra Chowdhry, and

KEMP, J.—This is an appeal on the part of Braja Bhukan Lal Ahusti, whose application to execute a decree, passed so far back as in April 1848, has been unsuccessful. The past history of this case

See also
15 B.L.R. 146.

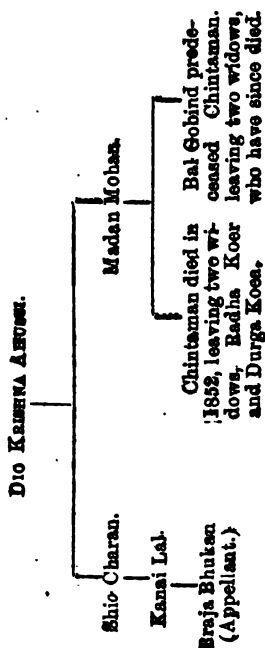
* Regular Appeal, No. 374 of 1870, from a decree of the Subordinate Judge of Gya, dated the 28th May 1870.

tion. [Couch, C. J.—In that case the son sued as manager.]
Can it be said that Mahendranath's son is heir to Rajkrishna?

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is briefly as follows. The family-tree stands thus, and is not disputed:—



In 1847, Kanai Lal brought a suit against Radha Koer and Durga Koer, claiming the estate of their husband Chintaman, on the allegation that the family was joint, and that he, Kanai Lal, was the nearest heir of Chintaman, and as such entitled to the immediate possession of the estate left by him, the right of his widows being limited to the receipt of a fitting maintenance.

The two widows of Chintaman, Radha and Durga, defended the suit, stating that a separation had taken place between Shio Charan and Madan Mohan, and therefore that they, the widows, and not

Kanai Lal, were entitled to succeed to their husband's estate.

The Principal Sudder Ameen, without deciding the question which was at issue between the parties, viz., whether the family was joint or separate, held that, even admitting the separation, the two widows were entitled to only a life-estate; and that, as Kanai Lal had established that he was at that time the nearest heir to Chintaman, he would be entitled to possession of the estate of Chintaman after the death of both the widows, who were to remain in possession during the term of their respective lives, without power to alienate.

Kanai Lal remained content with this decree, which postponed his right, and made it entirely contingent on his surviving the widows.

The widow Radha died first, but Durga, the co-wife, survived her husband for many years, and died very lately in 1277 Fasli (1869-70).

When she died, Kanai Lal, who had obtained the decree, the substance of which has been already stated, was not under the Hindu law, entitled to inherit the estate of Chintaman, inasmuch as he had become insane.

The Subordinate Judge, being of opinion that the decree of 1848 was a declaratory decree, and that the status of the heir at the time the succession opened out to him must be looked to, and not the position of the parties at the time the decree was passed, held that the appellant, who had been appointed manager on behalf of his father Kanai Lal, under the provisions of Act XXXV of 1858, was not entitled to execute the decree.

It may also be observed that the objectors, respondents, are in possession of the property in dispute as purchasers of the rights and interests of the widow Durga Koer in execution of a money-decree against her.

1872] I submit that 'Ch. V of the Dayabhaga' altogether applies to lineal descent. The learned Counsel also referred to *Gura Gabind Shaha Mandal v. Anand Lal Ghose Mazumdar* (1).

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Mr. Lowe for the respondent.—The plaint prays for an alternative decree; the relief asked for has been given, and the plaintiffs cannot appeal. The question of the defendant's lunacy cannot be decided on the evidence of one witness. The plaintiffs ought to have produced the same amount of evidence as would in the first instance have been necessary to prove Mahendranath insane before a commission; they ought to have proved tangible and unmistakable facts—*Tirumamagal Ammal v. Ramaswami Ayyangar* (2). [MARKBY, J.—There is the fact that he had

We are of opinion that the Subordinate Judge's decision is correct, and that the appeal ought to be dismissed. We consider it unnecessary to discuss the points mooted in argument by the pleader for the respondents, which, we may observe, were not raised in the lower Court, as we hold that the decree obtained by Kanai Lal in 1848 cannot be executed by his son in his representative capacity.

It has been pressed upon us that our duty is purely ministerial, and that we are bound to carry out the letter of the decree of 1848, however erroneous that decree may be. We think this a very limited view of the question and of our functions; which are to see the due execution of the decree, i. e., according to law.

It is clear to us that the two widows of Chintaman set up a separation, and it was only on their being able to establish that allegation that they could succeed in remaining in possession of their husband's estate; for failing proof of that allegation, they were entitled to nothing more or less than bare maintenance. The decision of the Principal Sadder Ameen must, in my opinion, be considered to be a declaratory decree. It permitted the widows to remain in possession as life-tenants, without power to alienate. Now, the position of a Hindu widow as a life-tenant is ordinarily that of a person who is entitled to enjoy the estate, but except under legal necessity, she is not

entitled to alienate or to waste it, so as to destroy or threaten the destruction of the corpus of the estate. The decree of the Principal Sadder Ameen simply left the widows in that position. It further declared that, as the plaintiff Kanai Lal had established that he was then, as he undoubtedly was, the nearest heir to Chintaman, he would as reversioner be entitled to possession when the two widows were dead. As that event has occurred, we must look to the position of Kanai Lal now that the succession opened out to him. But it is the estate of Chintaman which is in question, and we have therefore to see who is his heir. Now it is beyond all dispute that, when the succession opened out to Kanai Lal he was disqualified, being insane, and he therefore cannot inherit the estate of Chintaman. Whether his son can inherit or not is a question which we are not called upon to decide in this case. The son who is the appellant does not apply to execute the decree of 1848 as heir of Chintaman; but as representing Kanai Lal, and in the latter capacity (Kanai Lal not being the heir of Chintaman), his application must necessarily fail.

We dismiss this appeal with costs.

(1) 5 B. L. R., 15; see p. 45,
(2) 1 Mad. H. C., 214.

been found a lunatic in 1854.] That is not conclusive evidence in this case, 1 Taylor on evidence, § 1487. There ought to have been the clearest evidence that the defendant was insane when the succession opened—*Jessur Chandra Sein v. Russa Dass* (1). In Shamacharan Sirkar's Vyavashta Darpana, p. 1004, a "mad-man" is said to signify one insane from his birth. [MARKER, J.—Then, what is an idiot?] A person deprived of the internal faculty, and incapable of discriminating right from wrong—*Mitakshara*, Ch. II, s. 10, sl. 2. In *Pirumamagal Ammal v. Ramaswami Ayyangar* (2); Holloway, J., says:—"An idiot in Hindu law is one of unsound and imbecile mind who has been so from his birth." [COUGH, C.J.—A man may be born an idiot, but can you say that he can be born mad?] In 2 *Madanaghten's Hindu Law*, p. 185, the word "mad" is said to mean "one who is born mad." [Mr. Kennedy.—That is no authority; it is a mere note by the author.] Even if Mahendranath were found a lunatic, and as such incapable of inheriting, his son would take his father's share by substitution; see the judgment of Peacock, C.J., in *Kalidas Das v. Krishna Chandra Das* (3); 2 *Madanaghten's Hindu Law*, Ch. IV, pp. 129 and 130; 1 *Strange's Hindu Law*, Ch. VII, pp. 152 and 163. [COUGH, C.J.—Sir Thos. Strange is there treating of direct inheritance.] It may be so in the latter portion of the chapter, but I submit that the first part of Ch. VII, is not so limited. See further the *Dayabhaga*, Ch. V, sl. 19; the *Vyavashta Darpana*, p. 1014; and Mr. Montrieux's edition of the *Dharma-Sastra*, p. 46. The estate is charged with the father's maintenance, and the son succeeds; [COUGH, C.J.—It is not essential to the father's maintenance that the son should take the property.] I submit that in this case, the son would take his father's share. There is one other point. The appeal is from the decree, and the order refusing a review; but no appeal will lie from such an order; and, on this ground alone, the present appeal ought to be dismissed.

Mr. Kennedy in reply.

Cur. adv. vult.

(1) 2 W. R., 125.

(2) 1 Mad. H. C., 214.

(3) 2 B. L. R., F. B., 103, at pp. 118 and 120.

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The judgment of the Court was delivered by

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COUCH, G.J. (His Lordship, after stating the nature of the appellant's claim, and reading the portions of the judgment of Macpherson, J., from the words, "The question arises as to the defendant Mahendranath Bysak" to "whether, at the time of Bipasha Chandra's death in October 1869, he was incurably insane (1)"; and the words, "I am not prepared to find as a fact that Mahendranath Bysak was in 1869 absolutely incurably insane within the meaning of the Hindu law, so as to be incapable of inheriting," continued)—Now the question is whether the proposition there put forward, and upon which the judgment is founded, that a party must be absolutely incurably insane in order to be incapable of inheriting, is in accordance with Hindu law. Most of the texts upon the subject are to be found in the Dayabhaga, Ch. V—the chapter as to exclusion from inheritance. The first is from Menu, which says :—" Impotent persons and outcasts are excluded from a share of the heritage ; and so are persons born blind and deaf ; as well as madmen, idiots, the dumb, and those who have lost a sense (or a limb)." Another text is from Yajnyavalkya, which says :—" An outcast and his issue, an impotent person, one lame, a madman, an idiot, a blind man, a person afflicted with an incurable disease (as well as others similarly disqualified) must be maintained, excluding them however from participation ; one who cannot walk is lame." And in the next clause there is a text of Devala :—" When the father is dead (as well as in his life time), an impotent man, a leper, a madman, an idiot, a blind man, an outcast, the offspring of an outcast, and a person wearing the token (of religious mendicity), are not competent to share the heritage." The same text is in other books of authority as the Dayakrama Sangraha, where it is given thus :—" An outcast, his offspring, and impotent person, one lame, insane, or an idiot, a blind man, one afflicted with an incurable disease, should be supported, since they are excluded from the inheritance" (2). The words of the Mitakshara in Ch. II, s. 10, sl. 8, on exclusion from inherit-

(1) *Ante*, p. 201.

(2) Ch. III., sl. 7.

ance, are:—"The author states an exception to what has been said by him respecting the succession of the son, the widow, and other heirs, as well as the re-united parsoner, 'an impotent person, an outcast and his issue, one lame, a madman, an idiot, a blind man, and a person afflicted with an incurable disease, as well as others (similarly disqualified) must be maintained, excluding them however from participation,' being the same text as is in the Dayabhaga. I may also notice that, in *Wilberling on Inheritance*, s. 151, it is said:—"An succession takes place in consideration of the benefit conferred on the deceased by the funeral offerings, those who cannot, either for a general or special cause, or those who will not perform the ceremonies, are necessarily excluded from becoming heirs;" and he refers to s. 189, where it is said:—"The being impotent, or born blind and deaf, or having lost a sense or a limb, or being a madman, an idiot, or dumb, because these defects are considered as a punishment for crimes committed in a former state." The texts speak of incurable disease, but madness is a separate head of disqualification to which incurability is not attached. They do not support the proposition that a person must, as Macpherson, J., says, be absolutely incurably insane. That goes beyond what the texts warrant.

The evidence in the case with regard to the state of mind of Mahendranath Bysak was the deposition of Dr. Payne, who said:—(his Lordship read Dr. Payne's evidence and proceeded). It appears to me that this evidence shows a state of madness for a long period of time, and certainly, if not without an absolute possibility of cure, without a probability of it. It is not necessary to show by clear and positive evidence the absolute impossibility of a cure. There is no authority for that either in the texts or decisions. According to Dr. Payne's evidence, this person might well be described as a madman; and in 1869, when the succession fell in, he was certainly a madman, and was not at that time in a condition to offer the funeral oblations, which is given as the reason why such a person should be excluded from inheritance. For that reason we think the decree of the learned Judge cannot stand, and that part of it which relates to the share of Mahendranath Bysak

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1872 must be set aside. The texts which exclude a madman from inheritance declare that he is entitled to have maintenance; and this was not questioned in the argument before us. It must therefore be referred to one of the Judges of this Court (unless the parties can agree on it, which they will probably be able to do) to ascertain what is a proper sum to be allowed for Mahomedanah Bysak's maintenance from his share of the property. The parties will respectively bear their own costs of this appeal to be taxed as between attorney and client on scale No. 2.

Appeal allowed.

Attorneys for the appellants: Messrs. Gray & Sen.

Attorneys for the respondent: Messrs. Swinhoe, Lister, & Co.

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Aug 29

Before Mr. Justice Macpherson.

S. M. PRANKUMARI DAS AND ANOTHER v. ABINASH CHANDRA MOOKERJEE.

Costs, Payment of Plaintiff's, by Stranger to suit.

The Court will not order a person not on the record to pay the costs decreed against the defendant, when the latter is a real and not a sham defendant and himself did the wrongful act on which the suit was based, and has an interest in the subject-matter of the suit, and when the plaintiff knew before the trial the circumstances under which the afterwards sought to make such third person responsible for the costs, and might have added him as a defendant on the record (1).

On 5th August 1872 the *Advocate-General (offg.)* obtained a rule calling on Krishnalal Gosain to show cause why he should not pay to the plaintiffs their costs of this suit payable to them by the defendant Abinash Chandra Mookerjee under the decree in the suit. The rule was obtained on the decree and on affidavits of the defendant Abinash Chandra Mookerjee and of Mr. Carruthers, one of the attorneys for the plaintiffs. It appeared from these affidavits that the suit had been instituted to obtain possession of a house and premises No. 12, Old Post Office Street,

(1) See *Srinati Bimaswadari Dasi v. Ratanarayan Mitter*, 8 B. L. R. (App.) 65.

Calcutta, of which the defendant, on the 8th January 1872, had forcibly dispossessed the plaintiffs, and for damages. The plaint was admitted on the 27th January 1872. At the time of the dispossession, complained of, the defendant and Krishnalal Gosain carried on business in partnership as printers, under the style of the Bengal Printing Company, and after such dispossession, the plant and stock of the Bengal Printing Company were removed into the premises of which the plaintiffs sought to recover possession. On the 19th February Krishnalal Gosain advertized that he was the sole proprietor of the Bengal Printing Company, No. 12 Old Post Office Street, and on the following day the plaintiffs' attorneys, acting under instructions from their clients, gave Krishnalal Gosain notice that, unless he would forthwith deliver up possession of the said premises, they would apply to add him as a defendant to the suit. It appeared, however, that the threat was not carried into execution, and Krishnalal Gosain was never added as a defendant. On the 24th February Abinash Chandra Mookerjee and Krishnalal Gosain sued the plaintiffs for specific performance of an agreement to grant them a lease of the house No. 12, Old Post office Street, alleging in their plaint that, in pursuance of permission granted to them by the plaintiffs' agent, they had, on the 8th January 1872, taken peaceable possession of, and had removed their plant and stock-in-trade into the said premises. The suit for specific performance was dismissed on the 12th June 1872 with costs, the plaintiffs therein not appearing. The plaintiffs in this suit obtained a decree on the 5th June 1872 for possession of the premises, and for Rs. 2,000 damages, together with costs of suit on scale No. 2, which costs were taxed at Rs. 2,235-1. Neither the costs, nor the damages, nor any part thereof, had been paid by the defendant Abinash Chandra Mookerjee; and Mr. Carruthers in his affidavit stated that he had been informed by Mr. C. F. Pittar, the defendant's attorney, that the defendant was a man of very limited means, and wholly unable to pay the costs or the damages awarded, and that he had no interest either in this suit or in the suit against the plaintiffs for specific performance, and that such suits were defended and instituted for the sole benefit

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of Krishnalal Gosain. The affidavit referred to the deposition of the defendant at the hearing of the suit, in which the defendant stated that the printing-press had been bought with funds supplied by Krishnalal Gosain, who was the mortgaged partner of the firm ; that he, the defendant, took possession of the premises No. 12, Old Post Office Street, with Krishnalal Gosain's knowledge ; that he had ceased to be a partner in the Bengal Printing Company on the 15th April 1872, from which date he had received no profits therefrom ; that he had no interest in the suit ; and that the costs were being paid by Krishnalal Gosain. The defendant Abinash Chandra Mookerjee supported these statements by an affidavit in which he alleged that Krishnalal Gosain had agreed to pay the costs of this suit and of the suit for specific performance, and that the latter suit was instituted, and both suits were carried on, for Krishnalal Gosain's sole benefit.

In an affidavit filed in answer to those upon which the rule had been obtained, Krishnalal Gosain stated that Abinash Chandra Mookerjee was his managing partner, but that he had never authorised him to take forcible possession of the plaintiffs' premises, nor was he aware that Abinash Chandra Mookerjee had done so until after the institution of the plaintiffs' suit ; that he had merely learnt from Abinash Chandra Mookerjee that there was a house to let in Old Post Office Street, and had given his assent to renting it. He denied that he had ever agreed to pay all the costs incurred in the conduct of this suit, or of the suit for specific performance, or that such suits were for his sole benefit.

Mr. Kennedy, on behalf of Krishnalal Gosain, showed cause. Up to the present time there has been no case showing that the Court has power to order a stranger having a substantial interest in a suit to pay the costs due by the defendant, although there is a note by Mr. Bourke in his report of the case of *S. M. Bammasundry Dossee v. Anundololl Doss* (1) to the effect that such a course might, under certain circumstances, be adopted. In order to succeed, the plaintiffs must show something in the nature of barratry and maintenance. See *per* Lord Abinger in

(1) Bourke, 44.

Hayward v. Giffard (1). This was the principle adopted by Phear, J., in *Jugessur Coomar v. Prossono Coomar Ghose* (2) and in *S. M. Bammasundry Dossee v. Anundololl Doss* (3). The plaintiffs ought to have made Krishnalal Gosain a party defendant—*Berkeley v. Dimery* (4) and *Evans v. Rees* (5).

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The *Advocate-General* (offg.) in support of the rule.—The liability of Krishnalal Gosain depends on whether he consented to the wrongful act, or afterwards so gave his assent to it as to show that he concurred with Abinash Chandra Mookerjee—*Petrie v. Lamont* (6). The technical rule established by the English cases is only a portion of a broad principle; the real point to be looked at is who was substantially the defendant.—*Doe d. Marsters v. Gray* (7). In this case it was clearly established that Krishnalal Gosain paid for the defence, and was the real defendant.

Cur. adv. vult.

MACPHERSON, J.—It appears to me that this is not a case in which I ought to order that the damages and costs, or the costs, payable by the defendant Abinash Chandra Mookerjee, should be paid by Krishnalal Gosain. The case is by no means one of those contemplated by Phear, J., in the remarks made by him in his judgment in the case of *S. M. Bammasundry Dossee v. Anundololl Doss* (8); for this is not a case in which, in the course of the trial itself, it for the first time turned out that the party before the Court was a man of straw, and merely the puppet of Krishnalal Gosain, who was actually pulling the strings of litigation. In the first place, the party before the Court is not a man of straw, as far as I can see, whether he is or is not now able to pay the amount decreed. Abinash Chandra Mookerjee was in no sense a sham defendant, he was a real substantial defendant, who had himself done the wrongful act on which the suit was based, and who had a six-anna interest in the whole matter, which was really the subject of the suit.

(1) 4 M. & W, 194

(2) 1 L. J., N. S., 282.

(3) Bourke, 44

(4) 10. B & C. 113; in note.

(5) 2 Q. B., 339.

(6) 1 Car. & Marsh., 93.

(7) 10 B. & C., 615.

(8) Bourke, 44, at p. 46.

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Then, the plaintiffs did not for the first time, in the course of the trial itself, discover the position of the defendant with relation to Krishnalal Gosain. They, in fact, all along knew of the connection between these persons. The negotiations which had taken place between Abinash Chandra and the plaintiffs were for a lease of the house to him and Krishnalal Gosain for the purposes of the printing business which they were carrying on. At any rate, if the plaintiffs did not know of the partnership at the time they filed their plaint, they certainly knew on the 20th February as much of the connection of Abinash Chandra Mookerjee with Krishnalal Gosain as they now know, and they on that day wrote a letter to Krishnalal Gosain threatening to have him added as a party defendant to the suit, if he did not immediately give up possession of the house. The course indicated in this letter was in fact the course the plaintiffs should have followed: Krishnalal Gosain ought to have been made a defendant, for practically he was just as much liable in this suit as was Abinash Chandra Mookerjee. Krishnalal Gosain had certainly no more interest in defending the suit than Abinash Chandra Mookerjee had, except that he had a larger share in the partnership. It is a case in which the plaintiffs have chosen to sue only one person instead of suing two. The defendant was selected by the plaintiffs themselves, and is in no sense a sham defendant. I, therefore, refuse this application; but, considering all the circumstances, I shall not give any costs.

Rule discharged.

Attorneys for the plaintiffs, Messrs. Carruthers and Dignam.

Attorneys for Krishnalal Gosain, Messrs. Swinhoe, Law & Co.

[APPELLATE CIVIL.]

Before Mr. Justice Mitter and Mr. Justice Ainslie.

KASINATH SHAHA (PLAINTIFF) v. DWARKANATH SIRKAR AND
ANOTHER (DEFENDANTS).*

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April 16.

*Act VIII of 1859, s. 170—Judgment against Party for Non-attendance—
Statement in Written Statement not Proof.*

The discretion which a Court has, under s. 170, of Act VIII of 1859, of passing judgment against a party for non-compliance with the Court's order to attend and give evidence or produce documents in a suit, is not confined to cases where the party summoning him cannot prove his case otherwise than by the evidence of such other party, or where the fact to be proved is solely and exclusively within the knowledge of such other party.

A bare allegation by a defendant in his written statement, without any proof in support of it, that a certain person is his inveterate enemy, is not sufficient to discredit that person's testimony.

KASINATH SHAHA sued the defendants to recover possession of certain jote lands. He alleged that he was the defendant's jotedar for upwards of twelve years, of the disputed land, on an annual jumma of Rs. 32-8; that his name was recorded in the defendants' sherista; that on the 1st Aghran 1277 (15th November 1870), the defendants dispossessed him, and that the first defendant, Dwarkanath Sirkar, had entered into possession.

The defendants in their written statement stated that the plaintiff was not in possession of the disputed land as jotedar or in any other capacity; that they never put him out of possession; that the land was held in jote by one Jagannath Shaha, on whose death without issue, they and their co-sharers had leased it to one Zaker and others, who were now in possession by paying rent and submitted that the claim was barred by the law of limitation.

* Special Appeal, No. 1330 of 1871, from a decree of the Subordinate Judge of Rajshahye, dated the 26th June 1871, reversing a decree of the Munsif of that district, dated the 27th March 1871.

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The Munsif fixed the following issues among others :—

“ Is the suit barred by (the law of) limitation ?

“ Whether the plaintiff's allegation, with regard to his jotedari (right) and possession, and his subsequent ouster, is true or not ?”

In support of his case the plaintiff cited all the defendants as his witnesses. They were summoned to appear with their books and papers relating to the mauza in which the land in dispute was situated. In answer to the summons, only two of the defendants, Panchanand Chowdhry and Girish Chandra Moitro, appeared and were examined, and Panchanand Chowdhry also produced the books and papers called for. The plaintiff had three other witnesses examined in his behalf. None of the other defendants who were summoned appeared to give their testimony, and the Munsif considered the excuses which they offered through their pleader for their non-attendance to be insufficient. In the opinion of the Munsif, the plaintiff's case was fully established by the evidence of the two defendants who were examined, by the books and papers produced by one of them, and by the other evidence adduced by him. In addition to this finding in the plaintiff's favor, the Munsif added :—

“ Hence, with reference to the evidence alluded to, as well as under the provisions of s. 170 of Act VIII of 1859, and according to the ruling laid down in *Srimati Hemangini Dasi v. Bamnidhi Kundu* (1) the suit must be decided against the defendants, and a decree entered in favor of the plaintiff.”

The defendant Dwarkanath Sirkar appealed against the Munsif's decree.

On appeal, the Subordinate Judge reversed the Munsif's decree, and dismissed the suit. He assigned the following reasons for arriving at a different conclusion from the first Court :—

“ As for the evidence given by Panchanand Chowdhry, in favor of the plaintiff, I would observe that it cannot be relied upon, for it was long before the said Chowdhry gave this evidence that the appellant in his written statement described him as his ‘ inveterate enemy.’ The witness Madhab Chandra Shaha is the plaintiff's nephew. The witness Haris Chandra Ghose is the plaintiff's servant. The witness Girish

Chandra Moitra cannot speak about the alleged jumma and bond of the plaintiff with any degree of exactness. The witness Barada Gabind Sing states contrary to the plaintiff's own allegation that he was ousted in the month of Kartik (November). Under these circumstances the Court below was not justified in passing judgment against the defendants on their failure to appear as witnesses before him, for such a procedure is only applicable when a party to a suit refuses to attend and give evidence, though summoned to do so, and when the party, desirous of examining him, is unable to prove his case without his evidence, and when the matter which he is unable to establish turns upon such a question of fact as may justly be considered to be only within the knowledge of the party who refuses to give evidence. But it would appear that the special application made by the plaintiff on the 6th Magh 1277 (18th January 1871), citing the defendants as witnesses, mentions nowhere that he, the plaintiff, will be unable to establish his claim without the defendants' evidence. Moreover, the defendants in their verified written declaration, dated the 29th Magh 1277 (10th February 1871), state that the papers called for from the defendants are not in their possession. Besides, the plaintiff did not entirely rely upon the evidence of the defendants, but on the contrary he has furnished other evidence. Hence I see no reason why, under the circumstances of this case, judgment must, as a matter of course, be passed against the defendants under s. 170 of the Civil Procedure Code. This seems to be the view taken in the case of *Srimati Hemangini Dasi v. Ramnidhi Kundu* (1) which the Munsif has quoted in his decision. The evidence adduced on behalf of the defendants proves their allegation. The lower Court's decision must, therefore, be set aside, and the grounds of appeal are held to be valid."

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Against this decision the plaintiff appealed to the High Court.

Baboos *Nalit Chandra Sen* and *Girish Chandra Mookerjee* for the appellant.

Baboos *Debendra Narayan Bose* and *Mohini Mohan Roy* for the respondents.

The judgment of the Court was delivered by

MITTER, J.—We are of opinion that this case falls within

(1) 1 B. L. R., S. N., xi.

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the purview of the case of *Ishan Chandra Ghose v. Haris Chandra Banerjee* (1). The suit was for possession of a piece of land which the plaintiff claimed by virtue of an alleged jotedari right

(His Lordship, after briefly stating the facts, and reading the portion of the Subordinate Judge's judgment, from the words "Under these circumstances the Court below was not justified, &c.," to "within the knowledge of the party who refuses to give evidence," proceeded.)—In this case there is no dispute whatever that the defendants were duly ordered by the Court to appear and give their evidence, and consequently the first portion of the Judge's remark does not appear to be of much importance. With

(1) *Before Mr. Justice Macpherson and Mr. Justice Glover.*

ISHANCHANDRA GHOSE & OTHERS
(PLAINTIFFS) v. HARIS CHANDRA
BANERJEE AND ANOTHER (DEFEND-
ANTS).*

The 1st September 1869.

Baboo Taraknath Dutt for the appellants.

Baboo Bama Charan Banerjee for the respondents.

MACPHERSON, J.—In this case the defendant, having been ordered to attend and give evidence, without lawful cause, failed to comply with that order; and in consequence, the Court of first instance passed judgment against him. The first Court decided in favor of the plaintiff upon other grounds also. In appeal the lower Appellate Court reversed this order, not being satisfied with the evidence of the plaintiff, and saying that the Munsif ought not to have decided against the defendant, because he failed to appear and give evidence.

It appears to me that the judgment, passed by the Court of first instance against the defendant, was a judgment which that Court had full power to pass

and which that Court properly passed. And I think that the lower Appellate Court was wrong in interfering with that judgment. We have sent for the *munshi* B., and it appears clearly from it that the defendant was summoned specially under ss. 162 and 163 of the Code of Civil Procedure; and that, when he showed cause against being called upon to attend, the Court was not satisfied with the cause shown. Under these circumstances, and there being evidence which supported the plaintiff's case, the Munsif was quite right to decide against the defendant under s. 170. The judgment of the lower Appellate Court ought to be reversed, and the judgment of the Court of first instance restored with costs.

GLOVER, J.—I am of the same opinion. It is quite clear that the order of the Munsif was based substantially on the default of the defendant to come in and give evidence, and it appears, moreover, that the defendant was summoned after enquiry on the part of the Munsif that his evidence was necessary for the elucidation of the case.

*Special Appeal, No. 844 of 1869, from a decree of the Second Subordinate Judge of Hooghly, dated the 19th January 1869, reversing a decree of the Munsif of that district, dated the 24th August 1868.

reference to the other portion of it, it seems clear that there is nothing in the Code of Civil Procedure, or in any other law that we are aware of, which says that the provisions of s. 170 apply to those cases only in which the party summoning his opponent is not in a position to prove his case otherwise than by the evidence of that opponent, nor is there any law that it is in those cases only where the fact to be proved is solely and exclusively within the knowledge of the party summoned to appear, that the Court can apply the provisions of the section above referred to. This reasoning of the Subordinate Judge appears to be quite erroneous.

We wish further to observe that we are by no means satisfied with the mode in which the Subordinate Judge has dealt with the evidence adduced by the plaintiff. The Subordinate Judge says, with reference to one of the plaintiff's witnesses, that his evidence cannot be relied upon, inasmuch as the defendants had previously mentioned in their written statement that they and the witness were not on good terms. Such reasoning appears to me to be manifestly erroneous: otherwise a party may get rid of all his opponent's witnesses, by simply saying beforehand that they are not on good terms with him. The Subordinate Judge seems to have wholly overlooked the defendants' persistent and contumacious refusal to give evidence upon the merits of the case; and taking all the circumstances into consideration, we think that the judgment of the lower Appellate Court ought to be reversed, and that of the first Court restored, with all costs.

Appeal decreed.

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KASINATH
SHAH

v.

DWARAKANATH
SIRKAR.

1872
June 26.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

**SRINATH GHOSE AND OTHERS (DEPENDANTS) v. HARONATH
DUTT CHOWDHRY (PLAINTIFF).***

Act VIII of 1865 (B. C.)—Sale for Arrears of Rent—Fraud—Rights of a Purchaser at an Auction-sale held under Act VIII of 1865 (B. C.) when in Collusion with the former Proprietor—Landlord and Tenant.

A proprietor of a talook, which was about to be sold for arrears of rent, entered into an arrangement with the plaintiff, whereby, in consideration of a share in the purchase, he agreed to use his influence to urge on the sale, and to secure the purchase to the plaintiff. Under this arrangement the plaintiff became the purchaser of the talook, and the former proprietor obtained a share in the purchase. A suit by the plaintiff to oust the under-tenants was dismissed; the plaintiff took only as a purchaser at an ordinary execution sale, and did not obtain the benefit of s. 16 of Act VIII of 1865 (B. C.) (i).

In execution of decrees for rent amounting to Rs. 14,645-9-6 against Srinath Ghose and his co-sharesrs, the *ousut* talook Lakhinarayan Ghose, paying a rent of Rs. 1,395, was sold by the Deputy Collector of Perozepore, and was purchased by Haronath Chowdhry and Chandra Kumar Das. The Collector confirmed the sale, notwithstanding an application by the decree-holder to have it set aside on the ground of irregularity, and fraud. The decree-holder appealed to the Commissioner, who set

* Regular Appeal, No. 168 of 1871, from a decree of the Officiating Judge of Backergunge, dated the 14th April 1871.

(1) *Act VIII of 1865 (B. C.), s. 16.*— resident and hereditary cultivators, nor to cancel *bona fide* engagements made with such class of ryots of cultivators aforesaid by the rates incumbent of the under-tenure or his representatives, except it be proved, in a regular suit to be brought by such purchaser for the adjustment of his rent, that a higher rent would have been demandable at the time such engagements were contracted by his predecessor. Nothing in this section shall be held to apply to the purchase of a tenure by the previous holder thereof, through whose default the tenure was brought to sale."

"The purchaser of an under-tenure sold under this Act shall acquire it free of all incumbrances which may have accrued thereon by any act of any holder of the said under-tenure, his representatives, or assignees, unless the right of making such incumbrances shall have been expressly vested in the holder by the written engagement under which the under-tenure was created, or by the subsequent written authority of the person who created it, his representatives, or assignees. Provided that nothing herein contained shall be held to entitle the purchaser to eject khudkasht ryots or

the sale aside. Thereupon the purchasers appealed to the Board of Revenue; and by direction of the Board, the then Commissioner cancelled his predecessor's order, and confirmed the sale.

Haronath Chowdhry then brought the present suit, stating in his plaint that the talook had been sold for arrears of rent under Act VIII of 1865 (B. C.); that he was the purchaser of a 12-anna share and that Chandra Kumar was the purchaser of the other 4-anna share thereof; that on his going to take possession of the property, he was opposed by the defendants, Nilmani Bipari and others, on the ground that they held a *howla* and *shikmi* tenure under the former proprietors; that by virtue of his purchase he was entitled to possession free from all incumbrances created by the former proprietor. He prayed that he might be put in *khas* possession.

The defendants in their written statement set up, *inter alia*, that the plaintiff was a relative of Srinath Ghose, one of the former proprietors, and that Srinath had, in collusion with the plaintiff, caused the talook to be sold, and had purchased it himself in the name of the plaintiff; that the plaintiff, being merely a *benamidar* of the former proprietor, had no right to possession free from encumbrances created by the former proprietor; and that as they, the defendants, held the land in dispute under a good and valid title from the ancestor of Srinath Ghose, they could not be ousted.

Srinath Ghose, Ramnarayan Ghose and Gaur Chandra Ghose applied to the Court, stating that the plaintiff had purchased the talook *benami* for them, the original proprietors, for whose arrears it had been sold, and that the sale having been set aside by the commissioner, they were the rightful owners and in possession of the property. They were made parties to the suit.

The Judge raised the following issues :

First.—“ Whether the sale of the *ousut* talook Lakhinarayan Ghose to the plaintiff and Chandra Kumar Das is now in force ?

Second.—If it is in force, then,

1st.—Is plaintiff the real purchaser of the *ousut* talook, or did he purchase *benami* for the previous holders, Srinath Ghose and others ?

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2nd.—If he is the real purchaser, then is he competent to avoid the defendant's alleged *howlas* and take (*khas*) possession or not?"

The Judge held that, as the sale had been ultimately confirmed by the Commissioner under the direction of the Board of Revenue, it was valid and in force. He further found on the evidence that the plaintiff was the real purchaser of the three-fourths share of the *ousut* talook, inasmuch as, although he had purchased it with the understanding that Srinath Ghose should subsequently acquire a share, "the arrangement was not carried out, and the latter furnished no portion of the funds." He accordingly passed a decree in favor of the plaintiff.

The defendants appealed to the High Court.

Mr. Woodroffe (Baboos *Rumesh Chandra Mitter*, *Durga Mohan Das*, *Rashbehari Ghose*, and *Kasikant Sen* with him) for the appellants.

Mr. Kennedy (Baboos *Annadaprasad Banerjee*, *Kali Mohan Das*, *Chandra Madhab Ghose*, and *Ram Charan Mitter* with him) for the respondent.

Mr. Woodroffe contended that, as the sale was effected in collusion with the defaulter, the plaintiff could derive no title as an auction-purchaser under Act VIII of 1865 (B. C.)—*Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan* (1). His right was that of an ordinary private purchaser, and, as such, he was not entitled to set aside any incumbrance or tenure created by the defaulter. Srinath was bound to protect the rights of his under-tenants, and his not having done so was gross fraud on his part.

Mr. Kennedy contended that, as fraud had neither been alleged nor proved in the Court below, it could not be set up in appeal. The case made out by the pleadings was not what was relied upon in appeal—*Eshenchunder Singh v. Shamachurn Bhutto* (2). Fraud must be proved; mere allegation is not

(1) 10 Moo. I. A., 322.

(2) 11 Moo. I. A., 7.

sufficient—*Bowen v. Evans* (1). Unless there was an engagement previous to sale, nothing done subsequent to the sale could alter the existing equities. There was no engagement. There might have been a negotiation which gave Srinath a hope of getting some property and some advantage. *Nawab Sidhee Nuzur Ally Khan v. Rajah Oojoodhyaram Khan* (2) is distinguishable, as in that case there were no existing arrears of rent at the time when the arrangement was made; it was in consequence of the contract that the estate fell into arrears. Here there was no contract, there had merely been negotiations for a contract.—The evidence had wholly failed to prove an agreement or arrangement to bind the parties. It was impossible for the family to raise funds to pay the rent, consequently the estate fell into arrears. The circumstances of the case could not constitute the purchase by the plaintiff a purchase in trust for Srinath—*Nesbitt v. Fredennick* (3).

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Mr. Woodroffe was not called upon to reply.

MARKBY, J. (after stating the pleadings and the issues, continued)—The facts of the case seem to be as follows:—Sonamani, the zemindar, had a decree for rent for a large amount against Srinath and his co-sharers, who held what is called an *ousut* talook in the zemindari, and a sale of the tenure was threatened. Ambika Charan, the agent of Sonamani, and the plaintiff Haronath were each of them desirous to purchase the tenure provided they could make some favorable arrangement for that purpose with Srinath, who had the management of the whole affair, his co-sharers not interfering at all. The arrangement that Ambika Charan desired was that the decree-holder should have one-half; himself one quarter; and Srinath Ghose one quarter; he and the decree-holder were to find the funds; and the decree-holder and Srinath were to arrange that the biddings should be kept down. Ambika Charan hoped that he had secured this arrangement, and he went to the sale prepared to bid up to Rs. 80,000 and make the deposit. If he could have carried out his plans, he would have got one quarter of the property

(1) 2 H. L., Ca., 257.

(2) 10 Moo. I. A., 322.

(3) 1 Ball & B., 29;

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for Rs. 27,000 which, as the evidence shows, is 13 or 14 years' purchase. Haronath, however, had before that date gained over Srinath, and made an arrangement with him that, if the property were sold to him for Rs. 40,000 or 45,000, Srinath should have half. This was no doubt, on the face of it, a far less favorable arrangement for Srinath, but for some reasons of his own he accepted it; probably because he could more easily secure Haronath's co-operation than Ambika Charan's in his designs to appropriate the whole of the surplus proceeds for himself to the exclusion of his co-sharers. If the property went for more than Rs. 45,000 Srinath's share was to be settled afterwards. However, as the District Judge says, things did not go so smoothly as was expected. Another person stepped in, the Mohalanavis, as he is called, and through Chandra Kumar (purchaser of 4 annas) commenced an active bidding on his own behalf, and Ambika Charan being altogether excluded from the arrangement, began, as the decree-holder's agent, to threaten to postpone the sale (1). The competition of the Mohalanavis was

(1) Regulation VIII of 1819, s. 14, en-acts :—

"*First*.—Should the balance claimed by a zemindar, on account of the rent of any under-tenure, remain unpaid upon the day fixed for the sale of the tenure, the sale shall be made without reserve in the manner provided for in ss. 9 and 10 of this Regulation; nor shall it be stayed or postponed on any account, unless the amount of the demand be lodged. It shall however be competent to any party desirous of contesting the right of the zemindar to make the sale whether on the ground of there having been no balance due, or on any other ground to sue the zemindar for the reversal of the same, and upon establishing a sufficient plea, to obtain a decree with full costs and damages. The purchaser shall be made a party in such suit, and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss, at the charge of the zemindar or person at whose suit the sale may have been made,

"*Second*.—In cases also in which at a lookdar may contest the zemindar's demand of any arrear, as specified in the notice advertized, such talookdar shall be competent to apply for summary investigation, at any time within the period of notice; the zemindar shall then be called upon to furnish his *kabuliat* and other proofs at the shortest convenient notice, in order that the award may, if possible, be made before the day appointed for sale. Such award, if so made, will of course regulate the ulterior process; but if the case be still pending the lot shall be called up in its turn, notwithstanding the suit; and if the zemindar or his agent in attendance insist on the demand, the sale shall be made on his responsibility, nor shall it be stayed, or the summary suit be allowed to proceed, unless the amount claimed be lodged in cash, or in Government securities, or in notes of the Bank of Bengal, by the talookdar contesting the demand; and if such deposit be not made, the alleged defaulter will have no remedy,

however got rid of by giving him a one quarter share in the sale, and it was obviously impossible at that time, when upwards of Rs. 60,000 had been bid for the property, for Ambika Charan to stop the sale without Srinath's consent. But Srinath had then made up his mind to hold by Haronath, and stoutly protested against the postponement, threatening to appeal to the Court if any attempt was made to postpone; and the property was accordingly knocked down to Haronath for Rs. 64,000. Subsequently the arrangement between Haronath and Srinath turned out to be (when exactly it was made does not appear), that Srinath was to get one quarter of the property, Haronath was to get one-half, for which, as the District Judge calculates, he paid Rs. 24,000, and in some way or other Srinath got into his hands Rs. 25,000 out of the purchase-money, which he appropriated to his own use, not a rupee (as the District Judge finds) going to his co-sharers. (After discussing the evidence, his Lordship proceeded) :—It is further said that it is extremely improbable that Srinath would consent to an arrangement by which he got so small a share, and that it would have been better for him to let the property go for what it would fetch. There was however scarcely any real *bona fide* competition for the property, nor would a sale to the highest bidder have answered Srinath's purpose, unless the purchaser would assent to Srinath's plans for getting hold of the purchase-money. As the District Judge points out, it required a good deal of caution to secure to Srinath all the advantages which he desired. Upon the whole, we agree with the District Judge in his finding that Srinath came to terms with the plaintiff, and that the purchase was made by the plaintiff on the understanding that a one-fourth share should be subsequently handed over to Srinath, and that "Srinath was to aid the sale in his capacity of debtor by refusing to allow postponement if the decree-holder wished to

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but a regular action for damages and for a reversal of the sale."

And see *Krishna Mohan Shaha v. Af-
tabuddin Mahomed*, 8. B. L. R., 134.

By Act VIII of 1865 (B. C.), s. 6.—"If
the sum due under the decree, together
with interest to date of payment and all

costs of process, be paid into Court at
any time before the sale commences,
whether by the defaulting holder of the
under-tenure or any one interested in
the protection of the under-tenure, such
sale shall not take place."

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stay the sale, by assisting a postponement if there was danger of other parties becoming purchasers ;" and that Srinath got a one-fourth share as a reward for the service which he performed for the plaintiff by securing to him the property at a low price.

The question then arises upon these facts whether the plaintiff can annul the under-tenure and oust the Biparis. The District Judge thinks he can, because he is the real purchaser notwithstanding his arrangement with Srinath. But the District Judge has altogether omitted to consider the question, which is fairly raised in this case by the allegation of the defendants and by the facts found on the evidence, whether this was not against the Biparis a fraudulent transaction. If it was, and the plaintiff was a party to it, his suit as against the Biparis must be dismissed.

Now we take it to be clear that, if a lessor enters into an agreement with another person to get rid of his lessee by means of a fictitious sale and to share the profits of the transaction, that is a fraud as against the lessee. That would be a far stronger case than that of *Nawab Sidhee Nuzur Ally Khan v. Rajah Ojoodhyaram Khan* (1), where it was held to be gross fraud in a mortgagee to attempt to deprive his mortgagor of his right of redemption by means of a fictitious sale of the property for arrears of revenue. The question therefore is whether there was such an agreement in this case. Now it is quite true, as pointed out by Mr. Kennedy, that in the case of *Nawab Nuzur Ali Khan v. Rajah Ojoodhyaram Khan* (1), there was, when the agreement was made, the deliberate design to create the arrear of revenue in order to get the estate sold, whilst in the present case there was an actual arrear of rent for which a decree had been obtained and execution threatened, before any negotiation took place. But then it is found, and we think rightly found, that Srinath had, if not absolute control over the sale, at least a considerable voice in bringing it on or postponing it. Now we are by no means sure that it is not the duty of a lessor, under such circumstances, to do his utmost to postpone the sale, and so to protect the interests of his lessee ; that is certainly what an upright and honest

(1) 10 Moo. I. A., 322;

man would do under the circumstances ; and it is a rule of English law, which seems to be founded on broad principles of equity; which are applicable here also, that an intermediate landlord is bound to protect his own tenant from all paramount claims ; see *Graham v. Allsopp* (1). At any rate we cannot doubt that it is a gross fraud in the intermediate landlord to use his influence to urge on a sale for arrears of rent, in order to secure to the purchaser the advantages of such a sale under the Act : the intermediate landlord at the same time bargaining to receive, as a reward for his services, a share in the advantages thereby secured. And if this be a fraud, then to this fraud the plaintiff was a party, and the sale being part of the machinery by which this fraud was effected, we think it ought to be put entirely on one side in considering the question now before us, and that, as between the plaintiff and the Biparis, the plaintiff ought to be considered, not as having the rights of an auction-purchaser under Act VIII of 1865 (B. C.), but only as having the rights of a private purchaser. It seems to us that if we were to give the plaintiff a decree in this suit, we should be making the Collector and the Court instruments in the hands of the parties to carry out a gross fraud upon the Biparis ; a fraud in which we regret to observe more than one person was prepared to assist. It was scarcely denied by Mr. Kennedy that if a superior landlord, protected by an ordinary clause for forfeiture in case of non-payment of rent, were to enter into a contrivance with his lessee to get rid of the under-tenants, by putting the forfeiture in force that would be a fraud on the under-tenants, of which the superior landlord could not take advantage. And it seems to us to make no difference that the right to cancel the under-tenures is given by legislative enactment, and that the right is given, not to the superior landlord, but to the purchaser of the tenure. The fraud in both cases is that of the intermediate tenant, who seeks to destroy his own under-tenants, to which fraud the superior landlord in one case, and the purchaser in the other, has become a party.

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(1) 3 Ex., 186.

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DHRY.

This being so, the plaintiff's suit cannot be maintained. The plaintiff cannot take advantage of his own fraud to oust the Biparis, who hold under a valid grant from Srinath and his co-sharers, or their predecessors. It is unnecessary therefore to consider the two points of a more technical character suggested by Mr. Woodroffe,—namely, first, whether the sale having been set aside by the Commissioner it is now in force at all; and, secondly, whether the Deputy Collector of Ferozepore who sold the property was the Collector within whose jurisdiction the lands lay within the meaning of s. 3 of Act VIII of 1865 (B. C.). With regard to the first point, however, we may say that, having heard Mr. Woodroffe's argument, we are not disposed to give our assent to his contention that an order made by a Commissioner is irrevocable by his successor. No doubt this is a step which every officer would hesitate to take, and which he ought not to take except under very special circumstances; but here Mr. Simson, in cancelling Mr. Buckland's order and confirming the sale, which had been set aside, acted under the express directions of the Board of Revenue, and we are not prepared to say either that Mr. Simson should have disobeyed those directions, or that his acts done in obedience thereto were void.

Upon the other point which has not been fully argued, we express no opinion.

The decree of the district Judge, so far as it relates to the Biparis, must be reversed, and the plaintiff's suit, as against these defendants, dismissed with costs both in this Court and the Court below.

We are asked by Mr. Kennedy to declare the rights of the plaintiff as against Srinath. We think we ought not to do this. Though Srinath has been made a party in this sense that his name has been ordered to be added to the list of defendants, there has been no attempt in the lower Court to deal with the case separately as against him; the plaintiff asked for no relief as against Srinath, and he has nowhere stated what the rights are which he wishes to have declared. Srinath was in this case no more than a witness who volunteered to assist the defendants for his own purposes, and we are wholly at a loss to see,

why the District Judge made him and his co-sharers defendants. We decline to enter into any question as to the rights of the plaintiff as against Srinath Ghose or Ramnarayan Ghose or Gaur Chandra Ghose, the defendants subsequently added; and the proper course will be to order the suit as against them to be dismissed, not on the merits, but on the ground that there is nothing at issue between them and the plaintiff in this suit. These three defendants will bear their own costs.

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Decree modified.

[APPELLATE CRIMINAL.]

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June 3.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

IN THE MATTER OF THE PETITIONS OF J. D. SUTHERLAND AND
ANOTHER,*

I. L. R.
3 CAL 243

*Actual Possession—Criminal Procedure Code (Act XXV of 1861), ss. 282
and 318—Breach of the Peace regarding Possession of Land.*

The possession of a master by his servant—of a landlord by his immediate tenant, the person who pays rent to him—of the person who has the property in the land by the usufructuary, come within the meaning of the word “actual possession” in s. 318 of the Code of Criminal Procedure. Their meaning is not limited to bodily possession. But a person is not in “actual possession” where the rents are paid by the actual occupier, not to him, but to an intermediate holder.

All that is required to make a proceeding under s. 318 proper and valid, is that the Magistrate should be satisfied that a dispute exists, and he is to record the grounds of his being so satisfied. There is nothing which defines upon what grounds he shall be satisfied, or limits him to being satisfied by evidence given before him.

If a Magistrate is satisfied that the circumstances of a case require it, he may make an order under s. 282, notwithstanding that he has taken recognizances under s. 282.

This was an application to the Court on behalf of Harda Narayan and J. D. Sutherland based upon two petitions. By the first of these petitions, it was prayed that a certain order, dated the 6th February 1872, made by the Magistrate of Monghyr

* Miscellaneous Criminal Cases, Nos. 50 and 51 of 1872, against the orders of of the Magistrate of Monghyr, dated the 6th February 1872.

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under s. 282 of the Code of Criminal Procedure (1), requiring the petitioners to enter into recognisances for the sums of Rs. 10,000 and Rs. 2,000 respectively, to keep the peace towards L. Crowdy for a period of six months, might be set aside on, among others, the following grounds :—That there was no evidence before the Magistrate of an breach of the peace having been committed, or of a intention to commit a breach of the peace by the petitioners; that the Magistrate proceeded upon Police reports only; that the admission made by one or both of the petitioners did not amount to evidence of an intention to commit a breach of the peace; and particularly, as regarded Harda Narayan, that the Magistrate was wrong in making the order against him on the ground that Sutherland was his manager. No witnesses were examined against the petitioners, but Sutherland, in answer to questions put to him by the Magistrate, said :—“ It is my intention to carry out the business of constructing this factory. Some of the factory buildings, for instance, the wheel-house for taking water, &c., will be on this very piece of ground disputed, that is, which Mr Crowdy says is his.” The Magistrate remarked upon this as follows :—

“ It appears to me on review that the position of affairs between the parties is distinctly such as in the words of s. 282 would probably occasion a breach of the peace. Mr. Crowdy has not furnished any evidence in support of his account of the matter (or points dwelt upon by the pleader of the other side), but this want is supplied by the admissions of Mr. Sutherland, for he declares that he must have the lands on which Crowdy's tent is pitched, instead of having recourse to law to settle the dispute.”

By the other petition it was prayed that an order made by the same Magistrate on the 15th February 1872, in a proceed-

(1) S. 282.—It shall be lawful for the Magistrate of the District, or other Officer exercising the powers of a Magistrate, whenever he shall receive credible information that any person, whether a European British subject or not, is likely to commit a breach of the peace, or to do any act that may probably occasion a breach of the peace, to summon such person to attend at a time and place mentioned in the summons, to show cause why he should not be required to enter into a bond to keep the peace with or without sureties, as such Magistrate shall think fit.

ing under s. 318 (1), by which the Magistrate had declared Mr. Crowdy to be in possession of a certain piece of land, known in the proceedings as plot C., and directed the petitioners to resort to the Civil Court by a regular suit, might be set aside on, among others, the following grounds.—That the Magistrate did not hold and record such a proceeding as is required by s. 318 of the Code of Criminal Procedure; that the proceeding under s. 318 was founded upon the proceeding and the order in the proceeding under s. 282, which were themselves irregular; that Mr. Crowdy had not such possession as is required by s. 318, because, upon his own showing, he claimed plot C. as the joint of one Pochan Rai, who was alleged to be a ryot holding that plot under one Ram Charan Bhagat and others, the *ka kinadars* (lessees) of Islampore under Crowdy and others; and that Pochan Rai was no party to the proceedings.

It appeared that the Magistrate, in addition to the statements made by the parties themselves, proceeded upon an office-memorandum, which had been previously recorded, and which was in these terms.—

“Whereas, in the case of Government, first party, and Baboo Harda Narayan and Mr. Sutherland, second party, and Mr. Crowdy, third party, recognizances and security have been taken under s. 282. Act XXV of 1861, by reason of there being a probability of a breach of the peace, and in those proceedings it became apparent that a likelihood of a breach of the peace arises from this cause that, within the boundaries of the land which Mr. Sutherland alleges that he holds under a *mokurrari*:

(1) S. 318.—Whenever the Magistrate of the District, or other Officer exercising the powers of a Magistrate, shall be satisfied that a dispute, likely to induce a breach of the peace, exists concerning any land, premises, water, fisheries, crops, or other produce of land, within the limits of his jurisdiction, he shall record a proceeding stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to attend his Court in person, or by agent, within a time to be fixed by the Magistrate or other Officer as aforesaid, and to give in a written statement of their re-

spective claims, as respects the fact of actual possession of the subject of dispute. The Magistrate or other Officer as aforesaid shall, without reference to the merits of the claims of any party to a right of possession, proceed to enquire which party is in possession of the subject of dispute, and after satisfying himself upon that point, shall record a proceeding declaring the party whom he may decide to be in such possession, to be entitled to retain possession until ousted by due course of law, and forbidding all disturbance of possession until such time,

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lease from Harda Narayan as a part of Mauza Komalpoore, there are three plots, as described below, which Mr. Crowdy states to be held by himself of Pochan Rai. Since it is evident that, if any enquiry as to these lands be held under s. 318, the danger of a dispute may be avoided ; and as there is a fear that, notwithstanding the taking of recognizances and security from each party, yet on account of the quarrel an affray may occur, therefore by this proceeding an enquiry under s. 318 is originated, and notice is to be served on Mr. Crowdy of the Majhole factory, and Babon Harda Narayan and Mr. Sutherland, his manager, calling upon them to appear on the 15th February 1872 at Begoozeraⁱ in person or by mooktear with their proofs, and to file written statements respecting the property in dispute.

The petitioners sought to have both the orders of the Magistrate set aside.

The *Advocate-General* (offg.) and Mr. W. Sutherland for the petitioners.

Mr. Woodroffe (with him Mr. R. E. Twidale) for Crowdy.

The *Advocate-General* (offg.) contended that s. 318 does not contemplate both remedies at the same time. Where the Magistrate makes an order that parties should enter into recognizances not to commit a breach of the peace in order to obtain possession of disputed land, it is not necessary that he should immediately afterwards proceed to try under s. 318 which of the parties is entitled to keep possession. There was no evidence before the Magistrate, therefore he could not proceed under s. 318 at all—*Abhaya Chowdhry v. Brae* (1) and *Mussamut Anundee Koor v. Ranees Soonat Koor* (2). Crowdy's possession is not such as would entitle him to be kept in possession under s. 318. Possession, according to that section, ought to be actual, not constructive—*Dewan Elahoe Newoz Khan v. Suburunnissa* (3). Plot C., upon Crowdy's own showing, is in the possession of one Pochan Rai, who holds under a third person, who is a lessee under Crowdy, and to whom he pays

(1) 6 B. L. R., App., 148.

(3) 5 W. R., C., 14.

(2) 9 W. R., Cr., 64.

rents. There should be no adjudication therefore as to plot C. in favor of Crowdy. The Magistrate's order against Harda Narayan is wholly *Ultra vires*. There is no evidence at all that he took any part in the dispute regarding the lands in question.

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Mr. W. Sutherland on the same side.—The whole of the proceedings before the Magistrate under s. 282 were irregular, because they were based upon Police reports and upon a report by the Assistant Magistrate. The Magistrate should hold a regular enquiry ^{by} himself—*Mussamut Anundee Kooer v. Ranees Soonast Kooer* (1). Police reports are not evidence, nor do they furnish “credible information.” There must be evidence, and the Magistrate must record a proceeding—*Abhaiya Chowdry v. Brae* (2) and *Kashi Kishor Roy v. Tarini Kant Lahori* (3). The Magistrate was bound to take evidence and decide judicially—*Behari Patak v. Mahomed Hyat Khan* (4). Sutherland's answer to the Magistrate does not convey any admission of an intention to break the peace, and he has nowhere said that he will not have recourse to law to settle the dispute. The omission by a Magistrate to record a proceeding in a case of disputed possession renders his proceeding void—*Harvey v. Brice* (5). Whatever order may be given against Sutherland, nothing is shown against Harda Narayan, and he should not be required to give the recognizance, merely because Sutherland is his manager. In criminal cases the master is not bound by the acts of his servants, unless done by his orders.

Mr. Woodroffe for the respondent.—Crowdy was sufficiently in possession within the meaning of the section to claim the protection of that law. He was on the spot with his servants and with the consent of his lessee for the purpose of protecting the crops on the lands, &c. His ryots were in actual possession. By “actual possession” is not meant direct manual possession; such possession none but the cultivator himself could have: but

(1) 9 W. R., Cr., 64.

(4) 4 B. L. R., F. B., 46

(2) 6 B. L. R., App., 148.

(5) 4 W. R., Cr., 26.

(3) 3 B. L. R., Ap. Cr., 76.

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merely present possession is meant. The view taken by Phear, J., in *Dewan Elahee Newoz Khan v. Suburunnissa* (1) that the possession must be actual and not constructive, cannot be supported. The act of a Magistrate under s. 318 in recording reasons for being satisfied that a breach of the peace is likely to occur, and in issuing notices, is not a judicial proceeding, and therefore cannot come under s. 404. It afterwards becomes judicial when the parties come before him and satisfy him as to possession. The Magistrate is fully justified in acting promptly when there are reasonable apprehensions of a breach of the peace; and, particularly, where the accused party admits that he is going to commit a breach of the peace—*Behari Patak v. Mahomed Hyat Khan* (2). The law was correctly laid down by Glover, J., in that case. See also *Mussamut Zuhoorun v. Mussamut Begum* (3). The view taken by Phear, J., as to the proceedings referred by a Magistrate in *Dewan Elahee Newoz Khan v. Suburunnissa* (1) already cited, and afterwards in *Mussamut Anundes Kooer v. Ranee Soonat Kooer* (4), is not a correct view. The *Advocate-General* in reply.

Couch, C. J.—In the first of these cases, an application was made to the Court to set aside an order which had been made by the Magistrate of Monghyr under s. 282 of the Code of Criminal Procedure. The order was dated the 6th of February 1872, and ordered the applicants Harda Narayan and Sutherland to enter into recognizances to keep the peace for six months. It appeared that Sutherland was the manager for Harda Narayan, and it was objected that there was no reason for Harda Narayan being compelled to enter into recognizances. Certainly, there does not seem to be any reason that the order should extend to him, and we may say at once that, as regards him, it is one which the Magistrate was not authorized to make; and that portion of it must be set aside. We have then to consider the order as it applies to Sutherland. It was objected by the

(1) 5 W. R., Cr., 14.

(2) 4 B. L. R., F. B., 46.

(3) 6 W. R., Cr., 4.

(4) 9 W. R., Cr., 64.

Advocate-General, who appeared for him, that no evidence was taken by the Magistrate, and that consequently the order was not authorized by the Code of Criminal Procedure, and ought to be set aside. Now the order is stated by the Magistrate to be founded upon the statements which were made before him by Sutherland, the petitioner, and by Crowdy, the opposite party, both of whom had been summoned to appear before him. These statements must be regarded as evidence upon which the Magistrate might act if he thought it sufficient. They were admissions, I will not call them confessions, but admissions made by the parties who had been summoned to appear; and if upon their own statements there appeared to be sufficient grounds for the order being made, it would be superfluous for the Magistrate to take further evidence upon that subject. The Magistrate states that his order was founded upon these statements. (His Lordship read the portion of the Magistrate's order given above and continued):—It is not for us, as we often have to state in cases of this kind, to consider whether the Magistrate was right or not in being satisfied with this evidence. The only question is, was there before him evidence upon which he might be satisfied? We think that there was. If he came to the conclusion, upon the parties being summoned before him and making their statements, that it was necessary for the preservation of the peace to take a bond from them, he had full authority to do so, and there is nothing which would authorize or justify this Court in setting aside that order. So that, with regard to Sutherland, the order of the Magistrate will remain in force.

The second of these cases is also an application on behalf of Sutherland to set aside an order of the same Magistrate, dated the 15th of February, and made under s. 318 of the Criminal Procedure Code, and it was objected by the Advocate-General first that it was improper that an order should be made under this section, as well as an order, under s. 282. With regard to this objection, I see no reason that, if the Magistrate is satisfied that the circumstances require it, he should not make an order under both sections. There may be cases in which it would be necessary to do so. In this case, if the Magistrate thought that

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the circumstances required it, he was justified in doing it. But the principal question which was discussed was whether the decision of the Magistrate that the possession of one of the plots, namely, the plot marked C. on the plan, the principal one in dispute, was to remain with Crowdy, was one which could, in point of law, be supported, or whether the facts were not such that the Magistrate had exceeded his power, or made an error for which this Court ought to set aside his order. Now the circumstances with regard to the land, the possession of which is in dispute, and which dispute was considered by the Magistrate to be likely to lead to a breach of the peace, are stated in his finding, which we must take to be correct, and which appears to be supported by the evidence before him. The principal plot of land C. is said to have been up to the present time, or, rather, when this matter was before the Magistrate, cultivated by Pochan Rai, an Islampore ryot, whose evidence was taken in the case, and he stated that "the land where Crowdy's tent is now standing is mine. It is three bigas in four plots," and after giving the boundaries, he said :—"I have had this land from my father's time, 25 years ago. I pay rent, since 1274 (1866-67) to Ram Charan Bhagat and Jola Bhagat, *kathinadurs* of Islampore. Before 1274, I paid to Majhole *koti*" (office), and then he gave other particulars as to his getting receipts for the rent which are not material. The other plots A. and B. appear by the evidence to have been taken possession of by Crowdy, shortly before the matter came before the Magistrate for decision, under sub-leases from ryots of Komalpore; the sub-lease of A. being made on the 27th of January, and the sub-lease of B. on the 29th of January. The Magistrate has found, and I think correctly, that the mere putting up a tent by Crowdy on the land, which was what he was shown to have done, was not a possession within s. 318. He says that the possession must be substantial and practical, but then he holds, upon the evidence, that, as to A. and B., Crowdy was in possession, having obtained the sub-leases from the ryots, and having taken possession under them, although a very short time before the matter came before him for decision. With regard to the plot C., which is, as I understand, the piece

of land really in dispute between the parties, the Magistrate says that he accepts the account which was given by Pochan Bai as being the correct statement of the facts of the case, and upon that he considered that Crowdy was in possession ; and made an order that he should be retained in it.

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Now, there appear to have been several decisions of this Court which it is necessary to notice. In *Dewan Blahes Newoz Khan v. Suburunnissa* (1), a question of this kind came before a Court composed of three Judges, and Phear, J., said (Glover, J., having previously given his judgment):—"Had it not been for the strongly expressed opinion of Glover, J., I certainly should have been disposed to think that the 'possession of land, &c.,' contemplated in s. 318 of the Criminal Procedure Code was (as the section itself expresses it) 'actual' possession, and not constructive possession by the receipt of rents. It seems to me that the breach of the peace intended to be anticipated is something in the way of a personal struggle for the actual enjoyment of the immoveable property described ; and had I been unassisted, I should have considered that the primary sense of the words employed supported that view and no other." But the learned Judge, in the following paragraph says that, whatever might be the conclusion to which farther and mature consideration might lead him on this point, he thinks the Magistrate had no jurisdiction to enquire into the matter of possession at all, unless he was first satisfied that a breach of the peace was actually likely to occur in reference thereto : and the case was decided upon that point. This opinion that the section must mean actual possession, and not constructive possession was therefore not necessary for the decision of the case, and it appears to me, from the learned Judge's own words, to have been one which he thought might be altered by further and mature consideration. It was also opposed to the opinion of Glover, J., in the same case. Now, when we look at the terms of s. 318, it appears that actual possession there was not so much intended to mean manual possession, or, as Phear, J., seems to consider, as excluding a possession by the receipt of rent, but rather seems

(1) 5 W. R., Cr., 14.

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to have been used as distinguished from the right of possession. The Magistrate is to see who is the party in actual possession of the subject in dispute as distinguished from the person in whom the property or right to recover possession may be. The question is, what is to be considered as meant in this section by possession? I think that it cannot mean only the actual or bodily possession. There may be cases in which a person would properly be said to be in possession, although there was no bodily possession by him. There is the case of a servant being in possession, and it may be said that, when the servant is in possession, it is the possession of the master. So, also, if an occupier is paying rent, that is, the possession of the landlord to whom he pays the rent. For some purposes, the occupier has a possession; he has a possession which would enable him to bring a suit against a person who wrongfully disturbed him in his occupation, but, still, his possession is the possession of him by whose permission either given by a lease or any other mode of letting he holds the land and to whom he pays the rent. And this view of what is meant by possession and the construction to be put upon it in this section is supported by a passage in Domat's Civil Law where possession is treated of: it is in Bk. III, Tit. 7, and there, after quoting several authorities from the Institutes, the author says:—"From all which it is necessary to conclude that the true possession is, properly speaking, only that of the master; and that, although others, besides the master, may have a right to detain the thing, such as the tenant, the farmer, the usufructuary, who, having a right to enjoy, ought by consequence to have the detention of the thing; which in them is only a borrowed possession, or rather the master's own possession who possesses through them, because the right of possession cannot be separated from the property." Here are three classes—the tenant, the farmer, and the usufructuary. Although they have what the author calls a borrowed possession, it is rather the possession of the master than their own; and it appears to me that the proper construction of this section is that, by "actual possession" is meant the possession of a master by his servant, the possession of a landlord by his immediate tenant the person who pays rent to him, the posses-

sion of the person who has the property in the land by the usufructuary. These cases appear to me to come fairly within the meaning of the word "possession" in this section, and, with every respect to the opinion of Phear, J., it appears to me that this is the construction which should be put upon it, rather than to limit it to cases of bodily possession.

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Then to apply it to the present case, Mr. Crowdy was not in that possession: according to the evidence on which the Magistrate founded his decision, the immediate landlords of Pochan Rai, the persons to whom he paid the rent, were the two persons whom he named. Crowdy appears to have been a superior landlord to them, but that would not come within the meaning of the section, and Crowdy could not be considered to be in possession of this land by reason of the possession of Pochan Rai, the occupier: nor was he in possession, as the Magistrate has properly found, by reason of his having put up the tent upon the land. I think the Magistrate was wrong in point of law in deciding that Crowdy was in possession, and ordering him to be retained in it.

But another objection was taken, namely, that there had not been such a proceeding recorded, stating the grounds upon which the Magistrate was satisfied that there was a dispute likely to induce a breach of the peace, as would render his proceedings legal. That a compliance with the provisions of s. 318 is requisite, and that an omission on the part of the Magistrate to record a proceeding such as is required by that section renders the proceedings illegal, was decided in *Harvey v. Brice* (1). On this point we have in the same case in the 5th Weekly Reporter the judgment of Phear, J. After the passage which I before quoted in which he states that he thought the Magistrate had no jurisdiction to enquire into the matter of possession at all, unless he was first satisfied that a breach of the peace was actually likely to occur in reference thereto, he says:—"It necessarily follows that he must adjudicate definitely upon this point, and the Legislature also adds that he must record his reasons for being so satisfied. In this case he does not appear to have done

(1) 4 W. R., Cr., 26.

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either of these things." In another case of *Mussamut Anundee Kooer v. Ranees Soonast Kooer* (1), the same learned Judge says:—"I take the opportunity of adding that even, if there had been a proceeding in this case, and assuming that it was confined to the statement by the Magistrate that he had been directed by the Judge to hold the investigation, it would not be sufficient to satisfy the requirements of s. 318, for it is necessary that the Magistrate himself should enquire into the likelihood of a breach of the peace happening, and should come to a judicial decision upon it. It is that judicial decision which is the foundation of the subsequent investigation, and without it the investigation is void and inoperative." The words of the section being that, when the Magistrate shall be satisfied that a dispute likely to induce a breach of the peace exists, he shall record a proceeding stating the grounds of his being so satisfied, the learned Judge says, in the first case, that the Magistrate must adjudicate upon the matter, and then he seems to have gone a step further, and speaks of a judicial decision, whence it has been inferred that the Magistrate must take evidence, and proceed in the same way as in an ordinary judicial enquiry. Now I must say that I am unable to agree in this view of the requirements of s. 318. All that it requires in my opinion is that the Magistrate is to be satisfied that a dispute exists, and he is to record the grounds of his being so satisfied. There is nothing which defines upon what grounds he shall be satisfied, or limits him to being satisfied by evidence taken before him. It is properly provided that he shall state the grounds of his being satisfied in order that the revising Court may be able to see that he has not arbitrarily instituted proceedings of this kind. But that is all that is required; and in this case the Magistrate has stated that the ground of his proceeding was the office-memorandum which had been previously recorded. (His Lordship read the office-memorandum and proceeded.) There is here a formal statement by the Magistrate of the grounds upon which he was satisfied that a breach of the peace was likely to be committed, and I do not think any one would say that he was not justified in coming to

(1) 9 W. R., Cr., 64.

that conclusion. The facts were such as might fairly lead him to think that a breach of the peace was likely to ensue; and, being so satisfied, and having recorded the grounds thereof, he had jurisdiction to proceed in the matter. That objection to his proceedings therefore in my opinion fails. The grounds upon which it was sought to set aside this order, as regards the whole of it, fail; but for the reason that the Magistrate has taken upon himself erroneously to find that Crowdy was in possession, the order, so far as it relates to the piece of land C, must be set aside.

As to costs we think that each party should pay his own.

Order modified.

[APPELLATE CIVIL.]

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July. 22.

Before Sir Richard Couch, Kt., Chief Justice and Mr. Justice Bayley.

IMRIT NATH JHA (PLAINTIFF) v. ROY DHUNPAT SING BARADUR
AND OTHERS (DEFENDANTS).*

Joinder of different Causes of action against different Parties—Multifariousness.

Under five different pattas, A granted to B patni leases of five different mehals. The rents of the mehals falling into arrears, the mehals were sold on two different dates. A purchased two of the mehals, C purchased two of the mehals, and D purchased one of the mehals.

In a suit brought by B against A, C, and D, to set aside the sales on the ground of irregularity.

Held, the suit was bad for multifariousness, and must be dismissed. (1)

This was a suit for confirmation of possession of five patni-talooks, by setting aside a sale held under Regulation VIII of 1819, brought by Imrit Nath Jha against Roy Dhunpat Sing Bahadur, Braja Jha, Sheikh Inayet Ali, Sheikh Zaman Bax, and Rani Parbatti. The plaint stated that the plaintiff had obtained from the defendant Roy Dhunpat Sing the patni settlement of the five talooks under five patni pattas, dated the 7th May 1819. *Regular Appeal, No. 277 of 1871, from the decree of the Subordinate Judge of Purneah, dated the 6th September 1871.

(1) See *Commissioners of Sewers of the City of London v. Glasco L. R.*, 7 Ch., 453

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1868; that in Baisakh 1279 Mulki (April 1871), Roy Dhunpat Sing filed a petition in the Collectorate of Zilla Purneah for the sale of the said talook on account of arrears of the last half-year; that although the plaintiff was ready to pay the sum of Rs. 239, amount of arrears before the sale, yet the defendant Roy Dhunpat Sing fraudulently caused the property to be sold on the 15th and 16th of May 1871, without any notice in accordance with the provisions of cl. 2, s. 8, Regulation VIII of 1819; that at the sale the defendant Roy Dhunpat Sing purchased the talooks Nos. 1 and 3, the defendant Braja Jha purchased the talook No. 2, the defendants Sheikh Inayet Ali and Sheikh Zaman Bax purchased the talook No. 4, and Rani Parbatti purchased the talook No. 5.

The different defendants objected that the suit was multifarious, and ought to be dismissed.

The Subordinate Judge framed an issue as to multifariousness, and he also framed issues and took evidence on the merits.

He held that there was a misjoinder of claims, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

The *Advocate-General* (*offg.*) (Baboo Taraknath Sen with him) for the appellant.

Mr. Allan, Baboo Srinath Das, and Munshi Mahomed Yousaff for the respondents.

The *Advocate-General*, for the appellant, contended that the zemindar was a necessary party to the suit, Regulation VIII. of 1819, s. 14; and so far as he was the purchaser of parcels Nos. 1 and 2, there was no multifariousness. It was too late to raise or try the question after evidence had been gone into. The meaning of the word "multifarious" is laid down in Mitford on Pleading, p. 218. Here the facts are so connected that they cannot constitute multifariousness. There were two material questions to be decided, *first*, as to the deposit of money; and, *second*, as to the sticking up of the notice. If the plaint was bad for multifariousness, it ought to have been returned. It

was not necessary to go into evidence to try the question ; and evidence having been gone into, the defect was cured. Though different interests had been carved out by the sale, still there was one cause of action.

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Mr. Allan, for the respondents, contended that the pattas, though executed on the same date, were different. The patnis were different, the sums of money due for arrears were different, different notices were served in respect of the different mehals. If notice had not been properly served on one of the mehals, the sale of that mehal would be set aside, but the sale of the other mehals would stand good. The parties to the suit had not a common interest. The suit was therefore multifarious. He cited *Raja Ram Tewary v. Luchmun Pershad*. (1)

The *Advocate-General* did not reply.

COUCH, C. J.—The plaintiff in this case held five talooks under five patni pattas from the same zemindar, and it appears from the admission of the plaintiff's pleader, the correctness of which is not disputed, that these were separately sold for arrears of rent due separately upon each. The plaintiff now sues to set aside the sales, and to be restored to the possession of the property.

Now, as regards the zemindar defendant, there were five separate causes of action in respect of each talooka. Although one or more than one might have been properly sold, it by no means followed that all were. If it were not necessary to join other persons in the suit, it would be a case in which the Code of Civil Procedure would have allowed one suit to be brought because separate causes of action by and against the same parties may be joined in the same suit, subject to the entire claim being within the jurisdiction of the Court, but here it was necessary to join the other defendants who were purchasers of different talookas. With regard to them the causes of action, and the plaintiff's right to recover possession of the property,

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were separate. Here we have against the defendants the pursuer's separate suits upon separate causes of action put into one suit, and the decisions of this Court are clear that this is not proper. Sir Barnes Peacock, in the Full Bench case of *Raja Ram Tewary v. Luckmun Pershad* (1), gives reasons, in which I concur, why it should not be allowed; and he says that, when a plaint of this nature is presented, it ought to be rejected. Here the plaint was not rejected. The defendants were not present at that stage of the suit, and could not take the objection. The plaint having been received, all the defendants at the earliest possible time, including the zemindar, objected that they ought not to be joined in one suit. The objection being taken, the Judge properly framed an issue upon it. He not only framed that issue but other issues upon the questions of fact involved in the suit. I am not prepared to say that this was an erroneous course. The Judge might have felt doubtful whether his decision on the point of multifariousness if appealed against would stand, and if it did not, the case would be remanded to be tried on its merits. Probably he thought the better course was to take the evidence bearing upon the different issues, and then to give his judgment. Having done this, he decided, as he might have done in the first instance, that the suit ought to be dismissed upon the objection of misjoinder. It was contended by the learned Advocate-General that the Judge, having taken the evidence, ought not to have dismissed the suit upon that objection; that apparently no mischief had been done by joining the parties in one suit; and that the present respondent should not be allowed to retain the decision which has been given in his favor. I think this argument cannot have effect. The respondents had no power to compel the Judge to try singly the issue whether there was a misjoinder of claims. If he thought it proper to take evidence upon all the issues, the respondents could not prevent it. It is said that they could have come to this Court but this Court certainly would not, in the exercise of its supervising power, interfere in that stage of the proceedings. The defendants took the objection at the proper time, and the judg-

ment which the Judge gave, after hearing the evidence, must be considered as if it was given at the proper time, and as if he had rejected the plaint on its being first presented to him. When a plaint which ought to be rejected is received by the Court, and it is afterwards found that the plaint ought to have been rejected, the proper course is to dismiss the suit, as has been done here. Then, as regards any costs which the plaintiff may have been put to by the taking of the evidence, it seems that, after the objection of misjoinder had been taken by the defendants, and an issue raised upon it, the pleader for the plaintiff deliberately insisted on his right to proceed in this suit against all the separate purchasers.

We dismiss the appeal, and confirm the judgment of the lower Court with costs. Our judgment will not prejudice the right of the plaintiff to bring his suit in the proper form.

Appeal dismissed.

[ORIGINAL CIVIL.]

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Markby.

H. CLARTON v. D. N. SHAW AND ANOTHER.

1872
August 31.

Contract of Sale—Variance between bought and sold Notes—Admissibility of Parol Evidence.

The defendant, a Hindu, entered into a contract of sale with the plaintiff through the medium of a broker. The broker made no entry of the contract in his book, and there was a material variance in the bought and sold notes delivered by him. The notes were accepted and retained by the plaintiff and defendant respectively. In an action for non-delivery under the contract, *held* that the contract was made before the notes were written; the notes were sent by the broker to his principals merely by way of information; and the Statute of Frauds not applying, the plaintiff was at liberty to give parol evidence of the terms of the contract.

CASE stated by the first Judge of the Court of Small Causes, Calcutta, for the opinion of the High Court, under s. 7 of Act XXVI of 1864.

In this case the plaintiff sued the defendants for damages sustained through their breach of contract in failing to deliver

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certain bales for jute. The facts of the case, so far as they are material for its decision, are the following :—

1. The defendants are Hindus.

2. Mr. J. K. Moran, who acted as broker for the parties, delivered to the plaintiff the bought note marked B, and to the defendants the sold note marked A, which documents were received and retained by the parties respectively.

2a. Mr. Moran made no entry of the contract in his broker's book.

3. Subsequently Mr. Moran, at the request of the plaintiff, obtained from the defendants, and made over to the plaintiff, the exhibit marked C.

4. The first two parcels of jute referred to in exhibit C were delivered by the defendants on boardship on the 23rd, and were paid for by the plaintiff on the 24th January last.

5. On the 25th January the plaintiff, in his letter marked E, demanded delivery on that day of 250 more bales in terms of the exhibit C, which delivery the defendants, in their letter of the same date, marked F, declined to give, alleging a breach of contract on the part of the plaintiff in not having at once paid for the two parcels of jute referred to in paragraph 4.

6. An attempt was made by the plaintiff to prove that the defendants had, subsequently to the acceptance of the notes on both sides, accepted and ratified the contract as expressed in the bought note of the plaintiff. But this entirely failed.

The case coming on for hearing, the defendants' attorney, among other pleas, contended that, as there was a variance between the bought and sold notes, there was in fact no contract between the parties, and that the claim should therefore be dismissed. I decided the case against the plaintiff on this issue, holding that, as the bought note gave the plaintiff a right to insist on delivery on boardship, while the sold note gave the defendants an option of delivering on shore, the variance between the notes was material, and there was consequently no contract.

At the trial the plaintiff proposed to show by parol evidence what the contract between the parties really was; but, as I was of opinion that the fact of the interchange of bought and sold notes showed it to be the intention of the parties that the

terms of the contract should be reduced to writing, and that the notes which they had respectively accepted must be regarded as the ultimate expression by each of his several intention as to what the terms of the contract which he would assent to should be, and also as to what they had been made, and that everything which had passed between the parties through their broker previously could only be looked upon as the early stages of the negotiation, I declined to admit parol evidence of a contract which was not contained in the notes.

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A new trial was applied for on the ground that I should not have refused to receive the parol evidence tendered, and it was argued that, as it is admissible in cases falling within the provisions of the Statute of Frauds in which the bought and sold notes are found to vary, to establish the contract by a reference to the entry in the broker's book, so here in a case in which, the defendants being Hindus, the Statute of Frauds does not apply, it was competent to show, by the parol evidence of the broker or of others, what was in fact the contract which the parties intended to make for themselves. In support of this view, reference was made to the case of *Sieveau v. Archibald* (1), and more particularly to the elaborate judgment of Erle, J., in that case, as showing that the only reason for refusing to admit parol evidence to prove the contract where bought and sold notes differ, is the restriction contained in the Statute of Frauds. I have given that case my careful consideration. It appears to me that the learned Judges in that case do not decide that the entry in the broker's book may be referred to in case of variance between the notes; but that, where there is an entry in the broker's book, that entry is itself the contract. It also appears to me that the majority of the Court there held in very pointed terms that, where there is no entry in the broker's book, the bought and sold notes are themselves the contract. Further, if Erle, J., be correct in his view that these holdings can only be considered quite sound, if we interpret the word contract as meaning what is, to some extent and in a strictly practical point of view, the same thing, viz., the statutory evidence.

(1) 17 Q. B., 103.

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of the contract necessary under English law, it appears to me that even then, and even when the Statute of Frauds does not prevail, bought and sold notes delivered, accepted, and retained by the parties cannot be regarded in a more degraded light than as the expression, reduced into writing with the consent of the parties, of what their wishes and intentions with regard to the intended contract were at the last stage which the negotiations reached. If this view of mine be not erroneous, it seems to me that varying bought and sold notes accepted, retained, and acted on amount to positive evidence of the negative fact that, at the conclusion of the negotiation, the parties did not agree, and this evidence having been in fact (though unnecessarily as far as any statutory provision is concerned) reduced into writing by the parties themselves, or accepted by them when so reduced by their agent, no parol evidence is admissible to contradict them. There is surely some want of clearness in the argument of the learned dissentient Judge when he remarks that the Court must, according to the view of the majority of his colleagues, first arrive at the conclusion that there was a contract, before it can, by inspection of the terms of that contract, arrive at the opposite determination that there had after all been no contract. All that the law of evidence requires is that there should have been an intention to contract, and to reduce the terms of such intended contract into writing. This will be sufficient to exclude parol evidence, and then the Court, by inspection of the written expression of their intentions, may conclude that the parties have failed to carry out those intentions—1 Taylor on Evidence, p. 401, edition 1868, note 2. My colleague, Mr. Thomson, does not agree with me in these views, but considers that, for the reasons given by Erle, J., in the case of *Sievwright v. Archibald* (1) above referred to, parol evidence as to what the parties really intended to be their contract should be admitted. I have therefore the honor to submit for the opinion of the High Court the following points, viz. :—

1. Whether, on the facts of the case as set forth in paragraphs 1 to 6 of the foregoing statement, it was open to the

plaintiff to prove by parol evidence the existence and terms of a contract on which he could maintain the present action?

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2. Whether bought and sold notes materially varying are not, when received and retained by each party, as has been stated, conclusive evidence that, in the last stage of their negotiations, the parties did intend to make, and believed themselves to have made, a contract, but failed to do so?

The five exhibits marked A, B, C, E, and F were as follows:—

A.

No. 859.

Calcutta, 12th December 1871.

TO MESSRS D. N. SHAW, P. N. MITTER AND CO.,

DEAR SIRS,—We have this day sold by your order for and on your account to Messrs. H. Clarton and Co. (1,250) one thousand two hundred and fifty bales (four P. in heart, No. 5) jute, of the standard quality of the mark, of 300 lbs. each at Rs. (21-12) twenty-one, twelve per bale, or Rs. 22 free on board, measurement as customary on wharf 52 feet to ton of 5 bales.

Terms—Cash on delivery, which is to be taken and given within as each 250 bales are ready in all January 1872.

Yours faithfully,

J. K. MORAN AND CO.,
Brokers.

Brokerage at one per cent.

B.

No. 859.

Calcutta, 12th December 1871.

MESSRS. H. CLARTON AND CO.

DEAR SIRS,—We have this day bought by your order for and on your account from Messrs. D. N. Shaw, P. N. Mitter and Co., twelve hundred and fifty bales (four P. in heart, No. 5) jute, of the standard quality of the mark, of 300 lbs. each, at Rs. 22 free on board (twenty-two rupees per bale), measurement as customary on wharf 52 feet to the ton of 5 bales.

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Terms—Cash on delivery, which is to be taken and given within as each 250 bales are ready in all January 1872.

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Yours faithfully.

J. K. MORAN AND Co.,

Brokers.

C.

MEMORANDUM.

19th January 1872.

MESSRS H. CLARTON AND Co.

We are requested by Messrs. Shaw and Mitter to inform you that they will give delivery of your 1,256 B., four P., No. 5, as follows:—

250	on	22nd	January.
250	"	23rd	"
250	"	25th	"
250	"	27th	"
1,250	"	31st	"
1,250			

Yours faithfully-

J. K. MORAN AND Co.,

Brokers.

E.

MEMORANDUM.

FROM

H. CLARTON AND Co.,
No. 12, Clive Row.

Calcutta, 25th January 1872.

TO

MESSRS. SHAW AND MITTER.

DEAR SIRS,—The Captain of the "Anne Ryden" tells us that your 250 bales have not come alongside. Please state whether you intend shipping them, otherwise we must be compelled to buy in their place.

Yours faithfully,

H. CLARTON AND Co.

P. S.—We should be glad to know at once, as the ship will be stopped in her lading.

H. C. AND Co.

F.

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Calcutta, 25th January 1872.

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MESSRS. H. CLARTON AND CO.

DEAR SIRS,—In reply to your note just received, we beg to refer you to our solicitor's letter of yesterday. As you have broken the contract by not paying us on delivery of the goods as *per contract*, you cannot expect us to deliver any more.

Yours faithfully.

D. N. SHAW, P. N. MITTER AND CO.

The case was not argued before the High Court.

The judgment of the Court was delivered by

COUCH, C.J.—It being stated that the Statute of Frauds does not apply, we are of opinion that the plaintiff was at liberty to prove by parol evidence the existence and terms of a contract on which he could maintain the action. In *Sievwright v. Archibald* (1) a memorandum in writing of the contract was necessary, as it was within the Statute of Frauds; and Erle, J.'s opinion that the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree, was in accordance with that of the other Judges. Patteson, J., says:—"I consider that the memorandum need not be the contract itself, but that a contract may be made without writing; and if a memorandum in writing be afterwards made, embodying that contract, and be signed by one of the parties or his agent, he being the party to be charged thereby, the statute is satisfied." And the ground of his judgment is that, where the bought and sold notes are the only writing, and they differ materially, the statute is not satisfied. Lord Campbell says:—"I by no means say that, where there are bought and sold notes, they must necessarily be the only evidence of the contract; circumstances may be imagined in which they might be used as a memorandum of 'parol agreement.' What are called the bought

(1) 17 Q. B., 103.

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and sold notes were sent by him (the broker to his principals by way of information that he had acted upon their instructions, but not as the actual contract which was to be binding upon them. In the present case there being a material variance between the bought and sold notes, they do not constitute a binding contract ; there is no entry in the broker's book signed by him ; and if there were a parol agreement, there being no sufficient memorandum of it in writing, nor any part acceptance or part payment, the Statute of Frauds has not been complied with, and I agree with my brother Patteson in thinking that the defendant is entitled to the verdict."

There may be a complete binding contract, if the parties intend it, although bought and sold notes are to be exchanged, or a more formal contract is to be draw up. This is shown by *Heyworth v. Knight* (1). If the bought and sold notes do not agree, they cannot be used as evidence of the contract, but we cannot agree with the first Judge that their differing, and not being returned, is positive evidence that, at the conclusion of the negotiation, the parties did not agree ; the fact being, as we think, that the negotiation was concluded, and the contract made, before the notes were written, and that they were sent by the broker to his principals by way of information. To support the opinion of the first Judge, it would be necessary that there should exist a custom between merchants that they should not be bound until regular bought and sold notes have been exchanged.

(1) 33 L. J., C. P., 293 ; S. C., 17 C. B., N. S., 293.

[APPELLATE CIVIL.]

Before Mr. Justice Bayley and Mr. Justice Mitter.

TORAL KOMHAR (PLAINTIFF) v. MUSSAMAT AUCHHI AND ANOTHER
(DEFENDANTS).*

1872
August 10.

Mahomedan Law—Pre-emption—Refusal to purchase when Property offered for Sale—Estoppel.

A Mahomedan offered to sell his share of certain property to a partner, and on the refusal of the latter to purchase the same, sold it to a stranger: *held*, the partner could not sue to enforce his right after the sale.

Suit to enforce a right of pre-emption. The defence set up was that the plaintiff had refused to purchase the property when offered by the vendor; and that after such refusal, it was sold to the defendant.

The Munsif held that the evidence adduced by the defendant to prove the fact of the plaintiff's refusal to purchase was not trustworthy. He accordingly passed a decree in favor of the plaintiff.

On appeal the Subordinate Judge held that it was proved by the evidence of the defendant's witnesses, that the plaintiff had refused to purchase the property when he was requested to do so by the vendor, and that the claim must therefore be disallowed. He accordingly reversed the decree of the lower Court, and dismissed the plaintiff's suit.

The plaintiff appealed to the High Court.

Munshi Mahomed Yusaff, for the appellant, contended that a refusal to purchase before the sale to a stranger did not bar the plaintiff's right—*Sheikh Jehangir Baksh v. Lala Bhikari Lal* (1); there was nothing in the Mahomedan law to support

* Special Appeal, No. 375 of 1872, from a decree of the Subordinate Judge of Bhangulpore, dated the 22nd November 1871, reversing a decree of the Munsif of Monghyr, dated the 9th March 1871.

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the proposition that a refusal to purchase before the sale to a stranger would extinguish the right of pre-emption; the case ought to be referred to a Full Bench, as *Sheikh Jehangir Baksh v. Lala Bhikari Lal* (1) was in conflict with *Sheo Tuhul Singh v. Mussamat Ram Koor* (2).

Mr. Twiddle for the respondents was not called upon.

BAYLEY, J.—We are of opinion that this special appeal must be dismissed with costs. There is a clear finding of fact by the lower Appellate Court that the plaintiff had the option of purchasing the property as pre-emptor, and that, having that option, he deliberately refused to avail himself of it. It is equally clear, that after he so refused to purchase, the defendant No. 1, after due enquiry as to the vendor's title, and being satisfied that there was no impediment to his title, purchased that property.

It is urged in special appeal that, under the Mahomedan law of pre-emption, although a person having that right may have refused to purchase, yet his title to purchase is not extinguished until the property has actually passed into another person's hands; and the case of *Sheekh Jehangir Baksh v. Lala Bhikari Lal* (1) is cited in support of this contention. That case, however, has not its facts the same as this. There it was doubted whether there was a clear refusal on the part of the pre-emptor; and although it was incidentally laid down that the pre-emptor's title is not extinguished until the property has actually passed into another's hands, yet the principle of equity raised before us in this case was in no way considered or touched upon by the learned Judges in that case. The case of *Sheikh Jehangir Baksh v. Lala Bhikari Lal* (1), therefore, is neither a precedent in support of the special appellant's contention, nor in conflict with the case of *Sheo Tuhul Singh v. Mussamat Ram Koor* (2). There is, therefore, no necessity for our referring this case to a Full Bench as asked by the special appellant's pleader. On the other hand, the principle of equity is clear that, when a pre-emptor, on being

(1) 6 B. L. R., 42 in foot-note.

(2) W. R., Jan'y. to June 1864, 311.

asked to purchase a property, deliberately refuses to exercise his right of pre-emption, and after his refusal, a new purchaser, after careful enquiry, and having satisfied himself that there is no other impediment to his making the purchase, purchases that property, the pre-emptor should not be allowed to turn round and take away the property from the purchaser's hand on the accidental rule of Mahomedan law that his title to purchase is not extinguished until the property has actually passed.

In this view I would dismiss this special appeal with costs.

MIRZA, J.—I am entirely of the same opinion. No authority has been cited to us from the Mahomedan law to show that a pre-emptor can enforce his right of pre-emption, even after having positively refused to purchase the property in which he claims that right, but which after his refusal has been purchased by a third party.

But whatever may be the rule of Mahomedan law on this point, it appears to me quite clear that we should not allow the plaintiff in this case to commit a fraud upon the defendant by asking the latter to give up to him a property which he has purchased on the strength of the plaintiff's own refusal to exercise his right of pre-emption. The case falls within the ordinary principle of estoppels, and I think that the plaintiff in this case is precluded by his own conduct, which has been acted upon by the defendant, from impugning the title by purchase acquired by the latter.

Appeal dismissed.

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[ORIGINAL CIVIL.]

Before Sir Richard Couch, Kt. Chief Justice, and Mr. Justice Markby.

1872
Aug. 20 & 31.

BHAIRABDAN RAMCHAND v. BASSANTLAL BHAGAT.

Act IX of 1850, ss. 26 & 41—3rd Rule of Practice of Calcutta Small Cause Court—Time for Service of Summons.

Under s. 26 of Act IX of 1850, the time for service of summons on a defendant sued in the Small Cause Court must in all cases be fixed by the Rules for regulating the practice of the Court; consequently the Court has no power, under the 3rd Rule of Practice, to order service of summons on a defendant at any time before trial. The last six words of that rule are *ultra vires* (1)

CASE submitted, for the opinion of the High Court, by the first Judge of the Court of Small Causes, Calcutta, under Act XXVI of 1864, s. 7.

(1) The following sections of Act IX of 1850, and Rules of Practice of the Calcutta Small Cause Court are material for the purpose of this report:—

Act IX of 1850, s. 26.—On the application of any person desirous to bring a suit under this Act, the Clerk of the Court shall issue, under the seal of the Court, a summons which shall be numbered, and shall set forth the names of the plaintiff and defendant, the cause of action, with such particulars as shall be, from time to time, directed by the rules of the Court, and the amounts sued for; and shall be served on the defendant so many days before the day on which the Court shall be holden at which the cause is to be tried as shall be directed by the rules for regulating the practice of the Court; and delivery of such summons to the defendant, or in such other manner as shall be specified in the rules of practice shall be deemed good service.....

Act IX of 1850, s. 41.—The Judges of each Court, holden under this Act, subject to the approval of the Judges of the Supreme Court, shall have power

to make and issue all the general rules for regulating the practice and proceedings of the Court,.....and from time to time to alter any such rule.....; and the rules so made.....shall be observed.....in the Court of that Presidency, and shall be sent to the Supreme Court for approval, but shall be of force until disapproved.....

Rule 2.—The summons to appear to suits or actions shall be issued according to the forms in the schedule, and shall be dated as of the day when issued. Summonses shall be made returnable on the seventh day, but may be made returnable in a shorter or longer period, at the discretion of the Judge.

Rule 3.—Every such summons to appear to a suit or action shall be served by one of the bailiffs of the Court two clear days before the holding of the Court at which it shall be made returnable, unless the Court shall otherwise order.

Rule 6.—When any defendant shall, by keeping his house, place of abode, or place of business closed, or by ab-

On the 23rd February last, the plaintiff's gomasta, on the affidavit marked A (1), obtained at 11 A.M. a summons against the defendant, returnable at 2 P.M. of the same day. At 3 P.M. the defendant was called on to appear, but did not, nor did any one on his behalf answer to his name. The gomasta was then sworn, and stated that he had gone with the bailiff of the Court to serve the summons, and had found the defendant's shop closed, and his doors padlocked; and that the summons had accordingly been served by posting it on the door. The bailiff confirmed this statement, and I held this sufficient service under Rule 6. The merits of the case were then gone into *ex parte*, and a decree with costs was given in favor of the plaintiffs, and their application for immediate execution was granted. Nine other plaintiffs adopted similar proceedings against the defendant's property, and obtained similar relief. All the defendant's moveable property was seized, and the last of the creditors attached his person, and he was lodged in the Presidency Jail. On the 6th March a rule was granted, on the application of the defendant's attorney, calling on the plaintiffs to show cause why the proceedings should not be set aside, on the ground that the defendant had no sufficient notice of action. On the 20th March the rule was discharged for the defendant's default, subject to the opinion of the High Court on a reference. On the receipt of the opinion of the Honorable the Judges to the effect that it would have been better, notwithstanding the defendant's default, to have given him, under the special circumstances of the case, a short postponement, the defendant was brought up from jail and heard. His attorney's first objection was that the proceedings ought to be set aside on the ground that they were *ab initio* irregular and void, being founded on the six concluding

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seconding, or by violence or threats, prevent any bailiff from serving any summons to appear to a suit or action, as hereinbefore directed, and such summons shall have been conspicuously fixed on, or near to, such place of abode or place of business, or otherwise served as nearly as may be according to the mode hereinbefore directed, such service may be deemed good service.

Rules 53.—It is ordered that summons shall in future be returnable on the fourteenth day, unless when the plaintiff shall apply for a summons at a shorter date in terms of the 2nd Rule of the Court.

(1) The affidavit was to the effect that the defendant was removing his person and property from the jurisdiction of the Court with fraudulent intent.

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words of the 3rd Rule of Practice of the Court which he contended were irreconcilable with s. 26 of Act IX of 1850. After listening to a lengthy argument on both sides on this point, I came to the conclusion that the defendant's contention was correct, and set aside the proceedings subject to the opinion of the High Court on the point following, viz :—

Whether I was correct in holding that any summons issued returnable in less than two days, is irregular under Act IX of 1850, s. 26, notwithstanding the six concluding words of the 3rd Rule of Practice of this Court.

The Legislature has not authorized the making of a reference for the opinion of the High Court, except in the case of a demand by one of the parties, or of the existence of a doubt in the mind of the Judge who tries the case. A reference has not in this case been demanded, and I cannot myself say that I see any ground of doubt. The practice now objected to is, however, of nineteen years' standing. It supplies, and was instituted with the express view of supplying, a very serious defect in the Act which regulated the procedure of this Court, a defect which still exists, viz., that, while it provided for the seizure and detention of a fraudulent debtor's person, it furnished no means of attaching his property until after decree. Its operation has hitherto been admittedly very beneficial. On these grounds I should be glad to find that the Honorable the Judges considered my conclusion as to its illegality incorrect. But there is still another and a stronger reason which induces me to refer the question for the opinion of the High Court. I have the honor to forward herewith copy of a letter addressed in 1854 by Mr. Macleod Wylie, one of my predecessors, and his colleagues to the Judges of the late Supreme Court, through Mr. Henry Holroyd, the Prothonotary, and a book containing at p. 97, Mr. Holroyd's reply. It will be seen from the documents that the Judges of this Court fully detailed the reasons which induced them to ask the sanction of the Judges of the Supreme Court to the addition which they proposed to make to the then existing rule (1), and that such sanction was officially announced

(1) The reason given for the proposed in some cases of issuing a Bench addition was "to obviate the necessity warrant."

by Mr. Holroyd in the name of all the Judges, and attested by the endorsement of the Chief Justice, Sir Lawrence Peel. Under these circumstances I think it would be scarcely becoming in me to lay down on my own authority that an amendment which had received the express sanction of the late Supreme Court was *ultra vires*. I therefore request the opinion of the Honorable the Judges of the High Court on the point stated above.

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Mr. Gasper for the plaintiffs.—Act IX of 1850, s. 26, provides for the service of summons on the defendant “so many days” before the day of trial “as shall be directed by the rules for regulating the practice of the Court.” The rules relating to the time for return and service of summons are Rules 2, 3, and 53. The word “days” in s. 26, Act IX of 1850, is not an emphatic plural. See *Byston v. Studd* (1), where it is said of the action of waste given by the Statute of Gloucester against him that holds for life or for years, that it is within the equity of the statute that a man shall have an action of waste against him who holds but for a year, or for twenty weeks. If the Legislature had intended the word “days” as an emphatic plural, there would have been a clearer expression of such intention, similar for instance to that contained in s. 16 of the Indian Divorce Act (IV of 1869) with respect to the time for making absolute a decree *nisi* for dissolution of marriage. I submit that the word “days” in s. 26, Act IX of 1850, is equivalent to period, *i. e.*, that service is to be within such period before the hearing as the Court by virtue of Rule 3 may direct. Rule 2, which provides that a summons may be made returnable in a shorter period than seven days at the discretion of the Court, is not opposed to any section of Act IX of 1850; the Court therefore might make the summons returnable on the same day; and if that is so, the Court has power under Rule 3 to order service within less than two clear days before the hearing. If, however, the word “days” in s. 26 is to be taken as an emphatic plural, s. 41 gives the Judges of the Small Causes

(1) *Flowden*, 467.

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Court power to make rules for regulating the practice and procedure of the Court, which rules are to be sent to the Supreme Court for approval, but are to be of force until disapproved. These rules were made in pursuance of the power so given, and they have been approved by the Supreme Court, they must, therefore, be taken to have the same validity as a section of the Act; and, then, if s. 26 and the rule are irreconcilable, the ordinary maxim will apply, *vis.*, that, where two sections of a statute are contradictory, the last shall prevail. [COUCH, C.J.—Can a rule which is made *ultra vires* be taken as a good rule, and then beset up against the Act?] No; but if the rule was *ultra vires*, the Judge ought not to have made the reference, but should have amended the rule, and sent it to the High Court for approval; till disapproved, s. 41 declares that the rule shall be of force. Even should the Court's opinion be adverse to this view, I submit that the judgment of the Small Cause Court ought not to be set aside. A reference like this is similar in its nature to a new trial by the Small Cause Court itself, and to obtain that the defendant must have a good defence on the merits. Mere insufficiency of service is not enough—Temple's Small Cause Court Practise, p. 86.

Mr. Branson for the defendant.—If Rule 3 means that the Court shall have power to direct service within less time than a period exceeding one day before the hearing, the rule is *ultra vires*, and the judgment cannot stand—Addison on Torts, 3rd edition, p. 702. If the rule be *ultra vires*, no confirmation by the Supreme Court can give it any effect.

Mr. Gasper in reply.

The opinion of the High Court was delivered by

COUCH, C.J.—In this case the Judge of the Small Cause Court has set aside the proceeding subject to the opinion of this Court on the question whether he was correct in holding that a summons, returnable in less than two days, is irregular under Act IX of 1850, s. 26. With reference to the objection that it does not

appear that there is a good defence on the merits of the case, and therefore a new trial ought not to be granted, we must consider that the Judge is satisfied that it is a proper case for setting aside the judgment if the summons was irregular, and s. 53 gives power to the Judges in every case whatever, if they shall think fit, to order a new trial. We think the meaning of s. 26 is that the time between the service of the summons and the day on which the Court is holden on which the cause is to be tried, shall in all cases be fixed by the Rules for regulating the practice of the Court. The only time fixed by Rule 3 is two clear days. The words "unless the Court shall otherwise order" do not fix any other time, but give the power in any case to disregard the rule and the Act, and to have the summons served at any time before the trial. S. 41 does not in our opinion authorize this. The Rules for regulating the practice and proceeding of the Court, cannot override the provisions of the Act, and dispense with fixing a time for the service when the Act has expressly required that it should be done. In our opinion the summons in this case was not properly served, and the judgment was irregular.

Attorney for the plaintiff: Mr. Caraplet.

Attorney for the defendant: Mr. Fink.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Markby.

KALI PRASANNA ROY (ONE OF THE DEFENDANTS) v. AMBICA CHARAN BOSE (PLAINTIFF).

1872
June 6 &
August 31.

Principal and Surety—Acceptance of Interest in Excess—Giving Time—Discharge of Surety.

In an action against a surety for principal and interest payable on a promissory note, *held*, overruling the decision of the Court below (Macpherson, J.), that the creditor, by the mere acceptance, without the knowledge or consent of the surety, of interest in excess of what was due on the note, bound himself to give time to the principal debtor, and thereby discharged the surety.

See also
15 B.L.R. 340.

APPEAL from the judgment and decree of Macpherson, J., dated 8th of April 1872.

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The plaintiff sued one Brajendra Narayan Deb and the present appellant for Rs. 3,021-10-8, being the principal and balance of interest alleged to be due on their joint and several promissory note for Rs. 2,500, dated 19th October 1870, and payable to the plaintiff three months after date, i. e., on the 19th January 1871. The note bore interest at the rate of 24 per cent. per annum. It was not paid at due date; but, on the 29th January 1871, the defendant Brajendra Narayan Deb paid the plaintiff Rs. 250 on account of interest, the actual amount due on the 19th January being only Rs. 150. The present appellant in his written statement alleged that he had only joined as surety for the defendant Brajendra Narayan Deb in giving the plaintiff the note sued upon, and that the plaintiff at the time of taking the note was aware of this fact; that the payment by his co-defendant of Rs. 250 on account of interest was without his knowledge or consent, and he submitted that the plaintiff by taking such sum, which represented interest down to the 19th March 1871, had given time to, and precluded himself from suing, the defendant Brajendra Narayan Deb till that date, and that he as surety was thereby discharged.

The suit was undefended by the defendant Brajendra Narayan Deb.

MACPHERSON, J.—On the evidence, I consider it clear that the defendant Kali Prasanna Roy was throughout merely surety, and that the plaintiff was aware of the fact from the first. The only question I have to decide is whether or not Kali Prasanna Roy is discharged as surety, because time was given to the principal debtor on the 29th of January 1871, as Mr. Marindin contends it was. The promissory note is dated the 19th of October 1870, and was payable three months after date. The evidence is (and I have no doubt it is true) that on the 19th of January 1871, which was the due date of the note, the plaintiff called on the defendant Brajendra Narayan Deb, and was told to come back in eight or ten days when interest would be paid. Accordingly, on the 29th of January, the plaintiff did go back, and was then paid the sum of Rs. 250 on account of interest. Mr. Marindin, for the defendant Kali Prasanna Roy, contends

that, inasmuch as Rs. 250 was more than was actually due on the 29th of January, the plaintiff by accepting it practically gave time to Brajendra Narayan in such a manner as to discharge the surety; and he relies upon the case of *Blake v. White* (1).

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In the present case the circumstances are very different from what they were in the case of *Blake v. White* (1). In that case there was a memorandum in writing showing expressly the receipt of several months' interest in advance, and by the memorandum it was also agreed that the interest should be paid in future every six months, commencing from a certain day named. Here there is nothing of the sort; and there is absolutely no new agreement whatever between the parties beyond such as is evidence [by the simple fact that, whereas Rs. 150 was the amount due for interest up to the 19th of January, Rs. 250 were received by the plaintiff on the 29th of January. The plaintiff states that he never promised, and was never asked, to give time, and that the extra Rs. 100 were not paid to him then in consideration of his giving further time; and although he says he received the whole payment of Rs. 250 on account of interest, he says further that he knew that the whole of that sum was not due, but that on the 29th January he was in want of the precise sum of Rs. 250, and when he went on that day to Brajendra Narayan, he asked him if he could then give him Rs. 250, merely in consequence of the immediate need he had for that sum. The interest due on the 19th of January would have been Rs. 150; and as the monthly interest is Rs. 50, by getting Rs. 250 on the 29th, the plaintiff did in fact get that which was equal to two months' interest in advance. But inasmuch as he stated (and there is nothing to contradict him) that no calculation was made at the time, and nothing was said about the payment of interest in advance, I confess I cannot see how it can be said that there was any agreement which now prevents the plaintiff from proceeding against the surety; for I do not think that, by accepting the Rs. 250, he deprived himself of the right of suing the principal debtor. The defendants will be entitled

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to credit for the amount which the plaintiff has received as interest, but the plaintiff is entitled to recover against both the defendants.

As regards the manner in which the evidence of the plaintiff on cross-examination has been taken down with regard to the payment of the Rs. 250, I state distinctly that the meaning of the witness, as understood by me, was that the Rs. 250 were received by him with the knowledge that that sum was more than was then due for interest, but that that sum was not paid on any calculation that it was interest, which was due for two months in advance, or for any other time. It is true that, in answer to a suggestion of Mr. Marindin, the plaintiff did say that the sum received would be equivalent to interest up to the 19th of March; but he never said, nor meant to say, that there was any calculation made at the time, or that the amount asked for was the result of any understanding that it was interest for any definite time.

The *Advocate-General* (officiating) and Mr. *Lingham* for the appellant.

Mr. *Lowe* and Mr. *Branson* for the respondent.

The *Advocate-General*.—A creditor who takes interest on his debt in advance thereby agrees to allow the debtor to have the use of his money, and cannot sue him till the expiration of the time for which interest has been paid. The judgment of the Lord Chief Baron in *Blake v. White* (1) was based, not so much on the fact that there had been a binding agreement as on the consideration that the creditor, by receiving interest by anticipation, had precluded himself from suing. The case of *Greenough v. McGladdland* (2) only differs from the present one in that the creditor had taken interest in advance on two occasions instead of one. The *Advocate-General* also referred to the following authorities:—*Oriental Financial Corporation v. Overend, Gurney, & Co.* (3),

(1) 1 Y. & C., 420.

(2) 2 E. & E., 424.

(3) L. R., 7 Ch., 142

Boulton v. Stubs (1), *Nisbet v. Smith* (2), *Bonar v. MacDonald* (3), and *Story's Equity Jurisprudence*, par. 826.

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Mr. *Lingham*, on the same side, referred to the notes to *Rees v. Berrington* (4), and *Byles on Bills*, 10th edition p. 246.

Mr. *Lowe* for the respondent.—*Blaka v. White* (5) and *Greenough v. McClelland* (6) are distinguishable. The plaintiff in this case might have sued the principal debtor before the 19th of March 1871, giving credit for the over-paid interest.

Mr. *Branson* on the same side.—*Macpherson, J.*, has found as a fact that there was no agreement by which the plaintiff bound himself not to sue the principal debtor. The mere fact that the creditor has received more interest than is actually due would be no defence to a suit brought by him against the debtor before the excess payment had worked itself out; and if the principal debtor could not object to the suit as premature neither can the surety. The cases cited by the other side simply go on the principle quoted in *Samuell v. Howarth* (7), viz., that, if a creditor, without the surety's consent, gives time to the principal debtor, he thereby discharges the surety, "that is, if time is given by virtue of a positive contract between the creditor and the principal—not when the creditor is merely inactive." See also *Ewin v. Lancaster* (8).

The *Advocate-General* in reply.

COUCH, C. J.—This suit was brought on a promissory note of the defendants for Rs. 2,500, dated the 19th of October 1870, and payable three months after date, with interest at 24 per cent per annum, and the plaint stated that the plaintiff on the 29th of January 1871 received from the defendants Rs. 250 on account of interest. The defence was that the note was made by the appellant as surety for the other defendant, with the knowledge of the plaintiff, and that the Rs. 250 which the plaintiff alleged

(1) 18 Ves., 20

(2) 2 Br. Ch. Ca., 179.

(3) 3 H. L. Ca., 226.

(4) 3 Tu. L. Ca., 887 at p. 897.

(5) 1 Y. & C., 420.

(6) 2 E. & E., 424

(7) 3 Mer., 272

(8) 6 B. & S., 571.

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that he received as interest was in excess of the interest then due, and was given to and taken by the plaintiff without the knowledge or consent of the appellant, and thereby the appellant became discharged.

The plaintiff in his evidence said that he went to the first defendant, the principal, on the 19th of January, and was told by him he would pay interest a week or ten days afterwards, and on the 29th of January, the first defendant paid him Rs. 250 for interest; that he made no application for payment to the appellant; that the Rs. 250 was more than what was due for interest then,—it represented the interest which would be due up to the 19th of March; that he first applied to the appellant for payment in September 1871. He also said that on the day he was paid the Rs. 250, or two or three days before, the first defendant told him that the appellant joined in the note for his accommodation: and Macpherson, J., has found that he was aware from the first that the appellant was merely a surety. In reply to questions by the Court, he said, "I received the Rs. 250 on account of interest. I simply asked him to pay on account of interest, and he gave me that amount, and I gave him credit for it."

The rule that, if a creditor enters into any binding contract, the effect of which will be to give further time to the debtor without consulting the surety, the surety will be thereupon discharged, and that it is immaterial that the further time was given in consequence of the inability of the debtor to pay, or that no injury could thereby accrue to the surety, was laid down by Lord Loughborough in *Rees v. Berrington* (1), and Lord Eldon in *Samuel v. Howarth* (2). It has been followed in the Courts both of Equity and Common Law in many cases which are mentioned in the note to *Rees v. Berrington* (1), and must be followed by this Court.

It was argued by Mr. Branson for the plaintiff that there was no binding contract to give time; as if this meant an express contract. But a contract need not be expressed in writing, or by words, to be binding; a tacit or implied contract inferred from

(1) 2 Tu. L. Ca., 887; S. C., 2 Ves Jun., 540. (2) 3 Mer., 272.

the acts of the parties is equally binding as an express one. The facts of the case of *Blake v. White* (1) are no doubt different from the facts of the present case; but the law laid down by Lord Lyndhurst, then Lord Chief Baron, is clearly applicable. He says, p. 426:—"But the question is, whether time was not given to the first of January 1819 upon a valuable consideration? The fact is admitted that the obligee received interest up to that time in the month of October preceding. Could he then in the *interim* have been allowed by a Court of Equity to bring his action on the bond? I think not. It is admitted that, in the case of a principal only, without a surety, if the debtor had given six months' interest in advance, a Court of Equity would interfere to stop the action. If, in such a case, the time for payment of the interest could be explained consistently with the action, that would alter the state of the case; but, if it appear simply that the six months' interest had been given, what could the imagination suggest but a contract *ipsissimis verbis*, that the creditor should not sue for that time? Besides, the interest being paid, would a Court of Equity endure that the creditor should put that interest into his pocket, and next day sue for the principal? If that be so, as between the principal debtor and the obligee, the same principles will apply to the surety. The question here is whether the party did not preclude himself from suing on the bond, by receiving by anticipation the interest due between October and January. The shortness of that period cannot affect the question. Taking even an hour's interest in the same manner, if it were the habit to reckon interest by hours, would be attended with the same consequences. Under the present circumstances I must grant this injunction." The Judgment was not founded upon the memorandum in writing to which Macpherson, J., alludes as distinguishing this from *Blake v. White* (1), for Lord Lyndhurst in the previous page speaks of it as a mere agreement to give time without any consideration, which would not prevent the creditor from successfully prosecuting his action at law. "But the question is" he continues as above quoted.

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Putting the most favorable construction upon the plaintiff's evidence, and allowing that the Rs. 250 were not paid on any calculation that it was interest which was due for two months in advance, or for any other time, it is a fact that interest was received by anticipation, and the time for which it was received was a matter of simple calculation. I think it is clear that, under those circumstances, a Court of Equity would have interfered to stop the plaintiff from suing the first defendant until the time which was covered by the payment in advance had expired. The plaintiff bound himself to give further time, and the appellant was thereupon discharged from his liability on the note.

The decree, so far as it applies to the appellant, should be reversed, and the suit be dismissed as against him with costs, and the costs of the appeal should be paid by the respondent.

MARKBY, J.—In this case I do not think it necessary to examine the facts at length. It is admitted that the principal debtor paid to the creditor at the creditor's request, on the 29th January, a sufficient sum to cover the interest upon the debt up to the 19th of March, and it seems to me, with the greatest deference for the opinion of the learned Judge who decided this case in the first instance, that it is impossible to avoid inferring from that an undertaking that the creditor will not sue the principal debtor during that period. I do not discuss this part of the case further, because it has been clearly shown by the Chief Justice that the case of *Blake v. White* (1) distinctly lays down that we ought to infer this.

But then comes the question (and it is one which, from the way in which the case was then decided, was not considered in the first Court), what effect has this giving of time upon the engagement of the surety? Giving time to the principal debtor, though, as a general rule, it discharges the surety, does not always do so; see *Green v. Wynn* (2): and the question we have to decide is whether we ought to infer in this case from the receipt of interest such a giving of time as would discharge the surety. There was no intention to discharge him, and we can only give the surety his discharge if it

(1) 1 Y. & C., 420. (2) L. R., 7 Eq., 28; S. C. on appeal, L. R., 4 Ch., 304.

is necessary to do so, in order to do justice between the parties.

For these reasons it appears to me necessary to examine very carefully the grounds upon which the surety is discharged when he is discharged. Now, the most recent case on the subject to which we have been referred is that of *The Oriental Financial Corporation v. Overend, Gurney & Co.* (1); and as this case has been argued on both sides entirely upon the principles of English law, and as that case was decided by very high authority, our decision would ordinarily be governed by it. In that case it is laid down as the true explanation of law to be applied in such cases that, "if you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety, you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal." And then it is added that it is plain that this is the right explanation of the law, because "it is competent to the creditors to reserve all their rights against the surety in which case the surety is not discharged; and for this reason that the contract made with the principal is then preserved, because the creditors have engaged with the principal not to sue him for a given time, but subject to the proviso that the creditors shall be at liberty to sue the surety, and so turn the surety upon the principal without any breach of the engagement with the principal;" and at the end of the judgment it is said the defendants would have freed themselves from all difficulty by reserving their rights against the plaintiffs.

Now, if this be true *ratio legis*, I should certainly feel difficulty in saying that the surety was wholly and absolutely discharged by the acceptance of interest in advance from the principal. An undertaking by the creditor not to sue the principal debtor during the period in respect of which interest has been paid is implied, because otherwise, as Lord Lyndhurst points out in *Blake v. White* (2), the injustice would follow that the creditor might put the interest into his pocket, and next day sue the principal. But we are asked to infer from

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(1) L. R., 7 Ch. 142.

(2) 1 Y. & C., 420.

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the acceptance of interest in advance, not only a suspension of the right to sue the principal, but an absolute discharge of the surety. Now, if (as it seems to be put in *The Oriental Financial Corporation v. Overend, Gurney & Co.* (1), the creditor was prevented from suing the surety, only because his so doing would be a breach of the contract with the principal, it seems to me that the only inference, which in reason or justice could be made, would be, not that the surety was discharged altogether, but that the right to sue him was suspended for the same period as the right to sue the principal was suspended; so that the surety might not, by being sued during that period, be turned upon the principal. But, on a reference to some of the earlier authorities, most of which are quoted and recognized in *The Oriental Financial Corporation v. Overend, Gurney & Co.* (1), I am satisfied that the rule of law by which the surety is discharged does not rest exclusively on a consideration of the rights of the principal debtor, but upon a consideration of the rights of the surety himself. It seems to me in the first place, (I say it with the greatest deference,) that the judgment in *Oriental Financial Corporation v. Overend, Gurney & Co.* (1) does not quite correctly state the opinion of Lord Cranworth in *Owen v. Homan* (2). What Lord Cranworth said was not simply that the rights against the surety could be reserved, but that he thought "it must be competent to a creditor to contract with his principal debtor to give him time so far as he can lawfully and effectually do so, without prejudicing his right against the surety." This was said by way of protest against an opinion, which appears to have been expressed by Lord Truro in the Court below, that a creditor could not reserve his rights against the surety. But the observations and counter-observations of these learned Judges must be taken with reference to the sort of reservation which had been actually made in that case. The contract by which time was given in that case provided that nothing therein contained should discharge the sureties; but whilst providing that the creditor would not take any proceedings against the

(1) L. R., 7 Ch., 142.

(2) 4 H. L. Ca., 997.

principal during the period specified, these important words were added, "except at the instance or request of the sureties." It was therefore, not merely reservation of the creditor's right against the surety, but a reservation of their mutual right, the right of the creditor to compel the surety to pay the debt, and the right of the surety to compel the creditor at any time to sue the principal debtor."

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This at once suggests a doubt whether the principle on which the surety is discharged is correctly, or, at any rate, fully stated in *The Oriental Financial Corporation v. Overend, Gurney & Co.* (1), and I think the very authorities referred to in that judgment do introduce another and a very important element. I find that in *Oakeley v. Pasheller* (2), Lord Lyndhurst says:—"The principle of law is this, that, where a creditor gives time to the principal, there being a surety, without any communication with the surety, and without the consent of the surety, it discharges him from liability, because it places him (i. e., the surety) in a new situation, and exposes him to risk and contingencies which he would not otherwise be liable to:" and the Master of the Rolls had given a similar reason, namely, that the surety is thereby prejudiced. And so in another case to which the Lord Chancellor refers, *Samuell v. Hewart* (3), Sir William Grant says:—"The surety is held to be discharged for this reason, because the creditor by so giving time to the principal has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract." The principle is explained in the same way by Williams, J., in *Strong v. Foster* (4) where he says:—"The surety has a right to say to the creditor, 'I have reason to believe the debtor is in insolvent circumstances; you should sue him, or allow me to do so in your name.' Then, if the creditor said, 'I cannot sue him, because I have bound myself to give time,' that would discharge the surety:" and this explanation was adopted by the

(1) L. R., 7 Ch., 142.

(2) 10 Bli., 548; at p. 590.

(3) 3 Mer., 273.

(4) 25 L. J., C. P., 106; at p. 111.

S. C., 17 C. B., 201.

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Court of Queen's Bench in *Pooley v. Harradine* (1). These cases put the principle upon a very clear and intelligent basis—that the surety is discharged, not only because the principal debtor would be prejudiced by proceeding against the surety, but because the surety is prejudiced by the loss of the right to proceed against the principal debtor; and this fully accords with the opinion intimated in *Owen v. Homan* (2), namely, that, if with the assent of the principal debtor, this right of the surety is reserved by the creditor, then the surety, not being prejudiced, is not discharged. I do not of course mean to say that the principle, exactly as stated in the case of *The Oriental Financial Corporation v. Overend, Gurney & Co.* (3) has not been so stated by other authorities. It is so stated in a note to *Lewis v. Jones* (4), which is frequently quoted, and by Lord Eldon in *English v. Darley* (5), and it is to be found in various text-books. Nor can there be any doubt whence this statement of the principle has been derived. It is almost a literal translation of a passage in the Digest of Justinian :—" Quod dictum est si cum res-pactum sit, ut non petatur fidejussori quoque competere exceptionem : propter rei personam placuit, ne mandati iudicio conveniatur," (6). And as to this it is further said :—" Debitoris coventio fidejussoribus proficet, nisi hoc actum est ut dum taxat a reo non petatur, a fidejussore petatur ; tunc enim fidejussor exceptione non utetur" (7). But this is said of a contract wholly different from a contract of suretyship. The creditor here alluded to was under his obligation to preserve the remedies of the surety against the principal debtor, and was not, therefore, bound to pay any regard to the rights of the surety in his arrangement with the principal debtor. If therefore the creditor gave time to the principal debtor, the surety could originally take no advantage of it, but afterwards he was allowed to do so propter rei personam, i. e., for the sake of the principal debtor, because otherwise the principal debtor (*reus*) would be prejudiced ; for should the surety be sued by

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| (1) 26 L. J., Q. B., 156; at p. 160; | (4) 4 B. & C., 503. |
| S. C., 7 E. & B., 431. | (5) 2 Bos. & Pul., 61. |
| (2) 4 H. L. Ca., 997 | (6) Digest, Bk. II. Tit. 14, par 32. |
| (3) L. R., 7 Ch., 142. | (7) <i>Ib.</i> , par. 22. |

the creditor, he would then be able to sue the principal debtor at once, though the time given had not expired. But if the rights of the creditor to sue the surety had been preserved in the contract to give time, then, as the principal debtor could not complain, so neither could the surety, and the surety was liable first as before. This is no doubt exactly the principle laid down in *The Oriental Financial Corporation v. Overend, Gurney & Co.* (1), but is applied to a transaction of an essentially different kind, and with a wholly different result, namely, that the remedy against the surety is not extinguished, but suspended.

Bearing in mind and applying the principle as it is explained in *Samuell v. Howarth* (2) and *Strong v. Foster* (3), and, I must say as it seems to me, though perhaps not quite so clearly, in *Oakeley v. Pasheller* (4) also, there is, I think, little difficulty in disposing of the present case. The creditor had accepted interest in advance from the principal debtor, and he had thereby not only put it out of his own power to sue the principal debtor for a certain period, but had also put the principal debtor in a position in which it would be a hardship that he should be sued by any one at all during that period. But though all that the principal debtor could require us to say upon this would be that the rights of the surety against him should also be suspended, the surety could not be thus satisfied. The creditor has no right to put the surety without his consent in a position, in which he cannot exercise his rights against the principal debtor at any time he chooses to do so. Nor can we say the rights of the creditor against the surety are reserved. A simple reservation of the rights of the creditor would not be sufficient; the surety's rights must also be reserved. But that is excluded by the acceptance of interest, for no one would pay interest in advance, unless he was secure against being sued either by the creditor or the surety. The surety, therefore, whose rights have been interfered with by the voluntary act of the creditor, without his consent, has a right to say that he is discharged.

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(1) L. R. 7 Ch., 142.

(2) 3 Mer., 273.

(3) 25 L. J., C. P., 106; at p. 111;
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(4) 10 Bli., 548; at p. 590.

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It may perhaps appear unnecessary for me to have discussed this case at so great a length, seeing that I arrive ultimately at the same conclusion as the Chief Justice. It must, however be acknowledged that the case before us is a striking example of the serious consequences of ignorance upon this subject; and as the law upon it is not very easy to discover, I have thought myself justified in making this endeavor to ascertain how it really stands.

Appeal decreed.

Attorneys for the appellant; Messrs. Beeby and Butter.

Attorney for the respondent: Mr. Pittar.

[APPELLATE CIVIL.]

*Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Macpherson,
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NARAYAN SING (PLAINTIFF).*

See also
18 B.L.R. 451.
11 B.L.R. 399.

*Hindu Law—Mitakshara—Succession—Females. Exclusion of—Impartible
Joint Ancestral Property—Variants between Judge's Notes and Depositions
in Vernacular—Point arguable on appeal.*

A female cannot inherit an impartible ancestral estate belonging to a joint Hindu family governed by the Mitakshara, where there are any male members of the family who are qualified to succeed as heirs. This is a rule of law, and not dependent on custom. A custom modifying the law must be a custom to admit females, not a custom to exclude them.

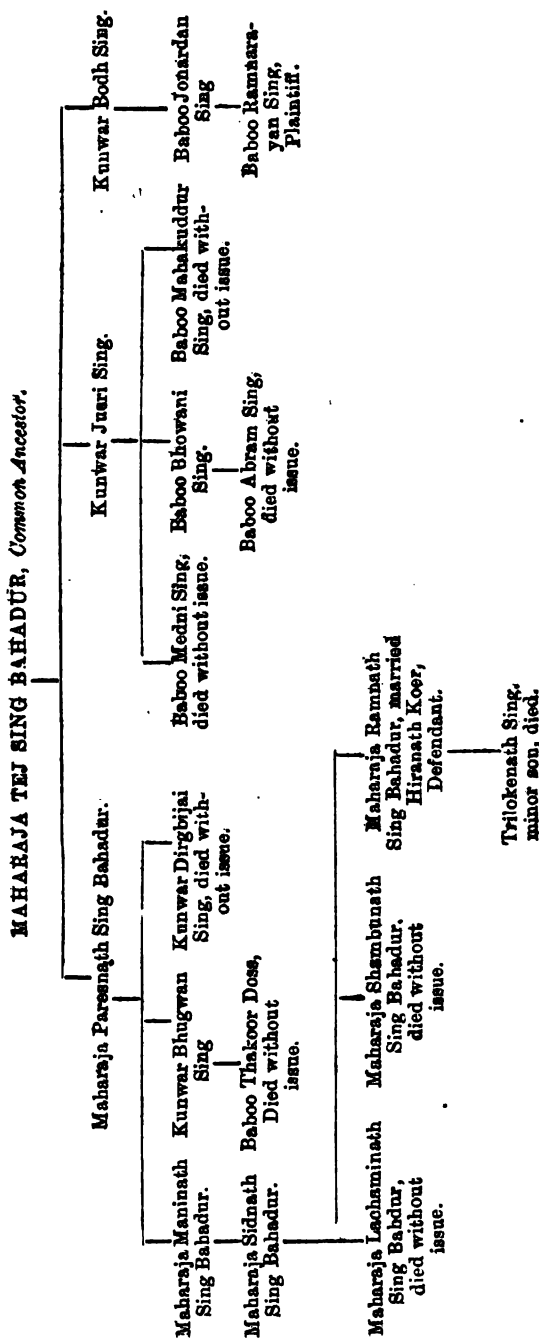
This suit was brought by Baboo Ram Narayan Sing to establish his right of succession to the raj and zemindari (the dignity and the estates) of Ramghur in Chota Nagpore, left vacant by the death of Tirloknath; the infant son of the last Maharaja, Ramnath Sing Bahadur.

* Appeal, No. 3 of 1871, under cl. 15 of the Letters Patent, dated the 28th December 1865, against the judgment of L. S. Jackson and Markby, JJ., dated the 14th April 1871, in regular Appeal, No. 254 of 1868, from a decree of the Zilla Court of Lohardugga, dated the 12th September 1868, the said Judges being divided in opinion.

The following genealogical tree shows the relationship of the parties :—

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Maharaja Ramnath Sing Bahadur died on the 9th October 1866, and his widow, the defendant Maharani Hiranath Koer, forthwith declared herself *enceinte*, and the estate was therefore taken under the management of the Court of Wards. On the 4th April 1867 she gave birth to Trilokuath Sing, who died on the 4th August 1867. The plaintiff thereupon claimed to be entitled to succeed to the raj as the next cognate.

About the year 1772 Mokand Sing, the then Raja of the Ramghur estate, was found in arms against the British Government, and refusing to pay revenue; Tej Sing, a member of the Raja's family, assisted the British Government in an expedition sent out against the Raja. The estate, having been afterwards forfeited by the Government, was bestowed by them upon Teg Sing, together with the title of Maharaja, as a reward for his services. Successive pattas were granted by the British Government to Maharaja Teg Sing and his eldest son Maharaja Paresnath Sing for limited periods; and ultimately, on the 25th March 1790, an ordinary settlement for ten years was made with Maharaja Maninath Sing, the eldest son of Maharaja Paresnath Sing, which settlement was afterwards made perpetual.

The plaintiff alleged in his plaint that the zemindari of Pergunna Ramghur was acquired by the common ancestor, Maharaja Tej Sing Bahadur, after whose death in 1774 it descended to his eldest son Maharaja Paresnath Sing. That Paresnath's brothers Kunwar Jusri Sing and Kunwar Bodh Sing (the plaintiff's grandfather) sued Maharaja Maninath Sing, son of Maharaja Paresnath Sing, in the Civil Court, for a division of the property (1); but on the 17th of November 1813, the Court of Sudder Dewanny declared the property to be indivisible. That, on Maharaja Paresnath Sing's death, the *gaddi* descended to Maharaja Maninath Sing; then to Maharaja Sidnath Sing; then to Maharaja Lachminath Sing, who, dying without issue, was succeeded by his brother, Maharaja Shambunath Sing, notwithstanding that his widow survived him; and on the death of Shambunath Sing without issue, his brother Ramnath Sing,

(1) *Koonwur Bodh Singh v. Seonath Sing* is called *Jye Sree Singh*, *Maninath Singh*, 2 Sel. Rep., 92 In the report of is called *Muncerath*, and *Sidnath* is called this case the names are as follows.—*Jusri Seonath*.

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notwithstanding a claim set up by Shambunath's widow for the zemindari, succeeded him; provision having been made for the widow, pursuant to the family usage, she notified to the Court her withdrawal of her claim. That according to the Mitakshara, the defendant, Maharani Hiranath Koer, the mother of the deceased infant Maharaja, had no right to a joint undivided share in the ancestral property; that she could not assume the raj or *gaddi*, or perform the duties belonging thereto; that according to family usage, and the custom of the Balaghat (high, land) district, females were excluded from succession to the *gaddi*, and that no case of female succession had ever occurred since the time of their ancestor Tej Sing, and that claims by female members of the family had frequently been negatived by judicial decision.

No sanad or patta to Tej Sing was produced.

The defendant, Maharani Hiranath Koer, in her written statement, said that the plaintiff and his ancestors, from a remote period anterior to the decennial settlement, had resided in their jagir, Mauza Budwian, at a distance of ten miles from the residence of the Maharaja, and lived separate and apart from her husband's ancestors, in food and business, and never took any part in the marriage and funeral ceremonies and other entertainments of her husband's family, and that therefore under the Shastras the plaintiff was not entitled to succeed. In the 5th paragraph of her written statement, she alleged that Lachminath Sing, Shambunath Sing, and Ramnath Sing were brothers, who lived in commensality and held the ancestral property in partnership as joint owners; and "that on the demise of each brother without issue, the next brother, upon receiving the mark of raja-elect, on his forehead from the hands of his elder brother, assumed the reign of the principality one after another; and for the reasons above stated, as also under the provisions of the Shastras, the right of succession to the raj at that time was disallowed" to the Banis; that the plaintiff was a jagirdar, like other jagirdars in Pergunna Ramghur, to her deceased husband, and was subject to the payment of rent and discharge of duties imposed upon him, under kabuliats executed by the plaintiff's ancestors; hence he

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could not succeed to this property; that the partition suit which had been brought by the plaintiff's grandfather was brought on the ground of an ikrarnama and also of right of inheritance, but the suit was dismissed, it being proved that the ikrarnama was invalid, and that the plaintiff in that case had not had any participation or interest in the property, but that her (the defendant's) husband's ancestor had been in possession of it for a period of more than twelve years; that in the zemindaris of Pendra, Raypore, Bhelau Dih, Juli, &c., within the Commissionership of Chota Nagpore, and the zemindaris of Tikari and Muksudpore in Zilla Gya, the Ranis were allowed to remain in the possession of the raj: that the *Gaddi* Khurkhur, which the plaintiff had included in his claim with the rest of the property belonging to Ramghur, was purchased by the defendant's husband, with the defendant's private funds and for her own benefit, and that it had been in her possession ever since its purchase.

A written statement was filed on behalf of the Court of Wards, but it merely disclaimed any interest in the suit, professed to hold the estate for the party who might be declared to be entitled to it, and prayed for costs.

The issues finally fixed by the Deputy Commissioner of Chota Nagpore were as follows:—

1. According to the Hindu Mitakshara Shastras, and the custom of the Ramghur family and country, who, among the different parties to this suit, is entitled to succeed to the raj-vacant by the death of Ramnath Sing's son, Triloknath Sing?

2. Whether *Gaddi* Khurkhur was purchased by Maharaja Ramnath Sing with his own money as Maharaja and on his own account, or with the money of Maharani Hiranath Koer and on her private account; and whether such *gaddi* is now a part of the Ramghur raj, or private property of the said Maharani Hiranath Koer?

Witnesses were examined on both sides for and against the alleged custom of the Ramghur family; and the following three documents were relied on by the plaintiff as showing that, by the custom of the country and the usage of the family, females were excluded:—

1st.—The decision of the Sudder Court in *Koonwar Bodh Singh v. Soonath Singh* (1). This was an action brought on the 19th April 1802 in the Zilla Court of Ramghur, by the two younger sons of Tej Sing, to recover from Maninath, the son of the eldest, two-thirds of the estate. Pending the suit Maninath died, and was succeeded by his son Sidnath. The defence set up was that, according to the custom of the mountainous country in which the estate was situate, and the usage of the family, the estate was not divisible, but that, on the death of the raja, for the time being, he was always succeeded in the raj and zemindari by the eldest son, to the entire exclusion of the other members of the family. The Zilla Court gave judgment against the plaintiffs, and this judgment being affirmed on appeal by the Provincial Court of Patna, the plaintiffs appealed to the Sudder Dewanny Adawlut. The Court held that, having regard to the extent and situation of the estate, to the zemindar possessing the title of Raja, and to his maintaining a sort of feudal establishment of troops and jagirdars, the Court could entertain little doubt that it was not a common estate divisible by the laws of inheritance. The decrees of the Zilla and Provincial Courts were accordingly affirmed.

2nd.—A return made by Maharaja Shambunath Sing, on the 22nd June 1846, on the requisition of the Governor-General's Agent and Commissioner, calling for a "statement of heirship" to the zemindari and ilakaders of the division. Ram Narayan, the plaintiff, was in that return put down as heir next in succession to his brother (2) Ramnath. Females were altogether excluded from this paper.

3rd.—A petition of Maharaja Ramnath, dated the 17th November 1862, written by way of answer to two perwannas, transmitting to the Maharaja for explanation copies of two petitions submitted by Maharani Thakurnath Sahi, widow of the late Maharaja Shambunath Sing, in which she made certain complaints. The following analysis of the petition was given by Markby, J., in his judgment:—It is a petition of the husband of the

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(1) 2 Sel. Rep., 92.

(2) *Bhai* or cousin-brother.

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defendant, the late Raja Ramnath Sing, denying the claim of the widow of Shambunath Sing, who seemed at that time inclined to assert her right. It is dated the 17th November 1862. It is not signed by any one, nor does it appear to whom it is addressed, but both parties have relied on it as a statement made by Ramnath Sing. It begins by referring to two perwannas of the person to whom it is addressed, which had been sent to Ramnath Sing together with a copy of a petition of the Maharani Thakurnath Sahi the widow of the Maharaja Shambunath Sing. One of these perwannas is then recited, and it seems to be an acknowledgment of the title of Ramnath Sing to the raj, and of the Maharani to maintenance, and to contain a request by the writer that the proper provision for the Maharani's maintenance should be made. After this recital the claim of the Maharani to the raj as heiress is denied by Ramnath Sing, and his own claim is thus stated :—

As the Ramghur semindari is an ancient ancestral property of your petitioner, according to the family and ancient usage (the Maharaja) in good faith and in sound state of mind, in the presence of assembled parties, marked your petitioner with the *tika* of raj, and died.

Then he sets out the history of the family from the time of Maharaja Sidnath Sing, and points out that Mahataja Lachminath Sing, though survived by his widow and a daughter (1), was succeeded by his brother : and then he says :—

In view of these circumstances, agreeably to the family usage, law and equity, reason and tradition, the Maharani is entitled to nothing more than food and raiment, because your petitioner and two others are three full brothers, and in default of heirs they succeed to the raj one after another.

Then follows the answer to the second perwanna. It again refers to the Maharani's petition and to an assertion by her that Ramnath Sing lived separate from his brothers Shambunath Sing and acted as his Dewan. This is strenuously denied by Ramnath, who asserts that he and Shambunath were "full brothers sharing in other's gain and loss," and that he only assumed the management of

(1) From the pedigree filed by the plaintiff, it appeared that Lachminath Sing died without issue ; see also the judgment of Jackson, J., *post*, p. 286.

the property according to custom when Shambunāth became too infirm to transact business. He then gives instances of a similar arrangement to this with regard to the management in other families, and denies that his having managed the business of the zemindari is any evidence of separation. He goes on to say that, with the exception of himself, no one had any right in the property; and since he was a partner and had a right in the *raj*, no *benami* could be effected in his name; for which reason all the business was transacted in the *benami* or fictitious name of Kunwari Burgah, a domestic. Subsequently he refers to the statement he had already made, that the *tilak* was affixed on his forehead, and then again combats the statement that he had separated from his brother. He then denies some allegations which the Maharani had made of ill-treatment. Next, he refers to certain instances of succession cited by the Maharani in her petition in her own favor, and says that "the practice of the jungle mehals is different from that of other districts." Some instances of the practice and usage of the jungle mehals are here given. Then he cites the cases of Palgunge, in which the brother succeeded in presence of the widow and nephew of the late Raja; of Kunda, in which the nephew succeeded in presence of the late Raja's widow; of Gowan, in which a cousin, in the fourth degree, succeeded in the presence of a female (the widow, no doubt) and a nephew of the late Raja. He says:—

Whereas your petitioner is the full brother of the late Maharaja, and lived in commensality with him, hence he is entitled to the *raj* considering his right from any point of view. The instances adduced of the Tikari Rani are not sufficient. The share of Baboo Motiram Sing was divided by the Court. Moreover, he left no near heir, and consequently the Banis came to possession; but the case of your petitioner is different, for he is full brother, lived in the same house, and ate at the same table with the Maharaja, and received by the Maharaja's own hands the mark of *tilak*.

The rest of the petition is taken up with again denying the Maharani's complaints of ill-treatment, and offering to allow her a suitable maintenance.

The Deputy Commissioner decided the case in favor of the

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plaintiff, and gave him a decree for possession of the zamindari of Ramghur and of *Gaddi Khurkhur* and all the other lands that formed the subject of the suit.

On appeal to the High Court, the case was heard before L. S. Jackson and Markby, JJ., who differed in opinion. Their Lordships gave the following judgments :—

JACKSON, J. (after briefly stating the facts, continued) :—In determining this appeal there are two considerations, which it seems to me important to keep in view. The first is that, although in point of form Ram Narayan is plaintiff and the Rani defendant, yet in fact both stand upon the same ground as claimants of an estate which is in the custody of the Court of Wards, and, therefore, the burthen of proof does not lie on the one side more than the other. The second is that the Rani does not, any more than her antagonist, claim the property under the strict provisions of the Hindu law, but that both parties, while referring severally to the *Shastras* (see the plaint and written statements respectively), also appealed to the custom which regulates the devolution of this *raj*, and this, I think it abundantly clear for other reasons, must be the basis of our decision. The plaintiff of course more emphatically relies on this custom or *kulachar*, but the defendant also gives her own version of it so as to show her own right, and to exclude the plaintiff. But what seems to me decisive on this point is the judgment of the Sudder Court in 1813 between the ancestor of Ram Narayan and the Maharaja of that time, in *Koomoor Bodh Singh v. Seonath Singh* (1). The opinion of the Court, which disposed of the suit, was in these terms :—“Adverting, however, to the extent and situation of the estate, to the zemindar possessing the title of Raja, and to his maintaining a sort of feudal establishment of troops and dependent jagirdars, the Court could entertain little doubt that it was not a common estate divisible by the laws of inheritance.” It does not precisely appear whether the Sudder Dewanny Adawlut concurred in, or dissented from, the view taken by the provincial Court in that case, namely, that Regulation X of 1800 did not apply to the estate

(I should have been inclined to think that it did), but the question does not seem to be of much importance, for the custom abolished by Regulation XI of 1793, and partially restored by the later law, is that of non-partition, and that alone. Nor, I think, is it material to inquire whether, as stated by Baboo Shama Charan Sirkar (1), the effect of the Vyavashtha and the judgment, in the case of *Beshanchund Rai v. Beshorchund Rai* (2), is to clothe huge zemindaries with the attributes of principalities. The term raj and the title Raja, as used in modern times, do undoubtedly occasion a certain amount of confusion. A pretty clear account will be found in the answer to a series of questions on the rights and privileges of landholders given by Gholam Hossein Khan, author of *Siar-ool Mooktakhireen* and the *Roy Royan*, printed in Harrington's Analysis, Vol. III, pages 314 to 356; see especially the answer to Question 31; and the case of Raja Tej Sing (there called Tanj Sing) is expressly mentioned by Gholam Hossein Khan, who (in answer to Question 30) calls him the zemindar of Ramghur. The true question, therefore, in this case seems to be whether the custom of the Ramghur zemindari or raj, as deposed to by persons acquainted with it, as known to the public functionaries of the district, as recognized by the family itself, and as established by precedents, favors the succession of the male line, or of the widow and mother. The question has been a little complicated by a shifting or widening of the issue (I am not sure which), so as to include a local custom; but it seems to me that, as far as the plaintiff is concerned, this amounts to nothing more than his seeking to strengthen his evidence as to *kulachar* or custom in his own family, by showing that a similar custom prevailed in families of the same or nearly the same rank in the vicinity. If we look at it in this point of view, we are, I think, relieved from certain difficulties as to the kind of proof required as to the precise allegation of the plaintiff. In this way also we are less embarrassed by abstract questions of Hindu law, and we also conform to the injunctions of Menu, Book viii, v. 41, where he prescribes enquiry into the "rules of certain families

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(1) Vyavashtha Darpana by Shama Charan Sirkar, p. 19, foot-note, 2nd edit.

(2) 1 Sel. Rep., 2,

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as among the peculiar laws which are to be established," "if they be not repugnant to the law of God" adds Culluca.

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Upon the issue I have stated, it seems to me that the plaintiff was entitled to judgment, and that he has been properly declared entitled to succeed to the raj and the estates.

I think that the witnesses called by the plaintiff prove that, in the belief of members of the family and by general repute, the *kulachar* excluded females. From the mode in which the Judge's notes of the evidence are worded, it would seem, at first sight, as if the witnesses, or at any rate most of them, meant to affirm as the only custom with which they are acquainted the succession of a single heir, and the non-participation of younger brothers; but I think this was not the meaning of the witnesses as shown by the original depositions, and that they meant to be as explicit on the one point as on the other. The occasional conflict between the Judge's memoranda and the recorded depositions is, no doubt, very embarrassing, and it is especially vexatious where the memorandum is not full, and where the Judges of Appeal are unacquainted or imperfectly acquainted with the vernaculars. In fact, the more nearly the note approaches to a complete representation of the witness's testimony, the greater is the difficulty, and I may say that, in some cases, the inclination of my mind has been to suspect that the note represented more exactly the witness's meaning than the actual deposition did. But I think there can be no doubt that, in case of difference, the actual recorded evidence *in extenso* is what we must be guided by; and it is to be hoped that the Procedure Code may shortly be improved in this respect, so as to get rid altogether of the double record. And in considering the recorded evidence in this case, as well as the written statements, allegations, and oral pleadings of the parties, large allowance must be made for the circumstances of the trial. Courts highly untechnical and simple, pleaders very imperfectly educated, and untrained agents whose advice continually misleads, compel us to be extremely cautious in the inference we draw from the line taken by either party in Court, and in the construction which we put on the evidence recorded. It is safer to collect the meaning of a witness from the whole of his testimony than to give their full meaning to isolated parts of it;

and if the witnesses in the present case be so dealt with, I think the plaintiff's contention will be found to be amply substantiated, so far, that is, as in the nature of the case, the witnesses could go. (His Lordship, after discussing the evidence of the plaintiff's witnesses, proceeded):—I have no hesitation in saying that, if we are to decide between this evidence and that which is adduced by the defendant to rebut it, I prefer the evidence for the plaintiff. But to my mind the oral evidence is the least convincing part of the plaintiff's case, and there is much more decisive matter behind.

For the purpose of ascertaining the custom of any given family in particular points, there can be no more important source of information than the declaration of successive heads of the family on solemn occasions, and in this case that source of information is open to us. In the first place, we have the return made by Maharaja Shambunath Sing on the 22nd June 1846. On that occasion the Maharaja distinctly and publicly acknowledged the plaintiff Ram Narayan as heir next in succession to his surviving brother (1) Ramnath, who followed him as Maharaja. It is said that the form in which the return is framed would not permit of the mention of wives, but this appears to me to be quite idle: the paper is called a "statement of heirship," and the ample column of "remarks" would certainly permit, and would have contained, the mention of the wife if she had been capable of succeeding. As the Maharaja left a widow, and as among Hindus marriage is contracted at a very early age, I think it is to be presumed that he was married at the time he made this return,—a presumption much strengthened by the words in the 4th column of the form, "at present no son is born." These words appear to me indicative of the married state, and of the expectation of issue. This public act of the Maharaja Shambunath Sing appears to me to be an insuperable obstacle for the defendant, and all but conclusive in favor of the plaintiff.

But next we have the petition or memorial of the succeeding Maharaja. But, before I speak of that paper, I will advert to

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the history of succession in the family. Testimony seems unanimous as to this, that neither in times antecedent to Tej Sing, the first Raja of the present family, nor in later days, has there been any instance of a female succeeding to the *gaddi*; but, as observed by the Judge below, there is no exact information as to the estate of the family before Tej Sing, so that it cannot be said whether it affords examples of the supersession of a female heir or not. Nor is there any such instance in the early days of the present family, for, down to the generation just past, there has been abundant male issue. But it so happened that three sons of Maharaja Sidnath Sing (who was the grandson of Tej Sing) all died without male. or, indeed, it seems, any issue, but leaving widows. In each instance the succession was taken up by the next brother, the widows being passed over. There are thus two instances which, although modern, are in exact accordance with the custom alleged by the plaintiff. The defendant seeks to get over these facts by the averment contained in the 5th paragraph of her written statement. Now, unfortunately for her, the decision of the Sudder Court in 1813, in *Koonur Bodh Singh v. Seonath Singh* (1), had set at rest the question of "partnership" in the property, not to speak of the evidence on that point; and it is difficult to conceive any theory of joint ownership which should make brother succeed after brother, and then suddenly terminate the course of such descent in favor of the youngest widow. But the defendant apparently rests her case very much on the fact of commensality between the brothers as justifying their preference to widows, and in the 4th paragraph she asserts that the plaintiff is disqualified by reason of his having lived (as well as his ancestors) separate, and at a distance from the senior branch; and in the 8th paragraph she puts this in a different way by objecting to him as a jagirdar. These objections appear to be disposed of by Maharaja Shambunath's return, which, of course, would not have recognized Ram Narayan if he had been disqualified for any such reasons. But it is on this point of the case that the memorial of Maharaja Ramnath, which I mentioned a little way back, appears to me to have so much significance.

(1) 2 Sel. Rep., 92.

This document is dated 17th November 1862, and was written by way of answer and in obedience to a perwanna apparently of the Deputy Commissioner, transmitting to the Maharaja, for explanation, two copies of *urzis* submitted by Maharani Thakurnath Sahi, widow of the late Maharaja Shambunath Sing in which she appears to have made certain allegations and complaints, to the refutation of which accordingly the raja addresses himself. In considering the terms of this petition, it is natural to observe that it begins with a most important recital. It sets out the contents of the official perwannas, to which it is an answer, to the following effect :—"That Kunwar Ramnath Sing, brother and heir of the deceased Maharaja Shambunath Sing, has been appointed Raja; that the Maharani, petitioner, is entitled to maintenance only, &c., &c." The title of the Raja being thus fully acknowledged by the official whom he was addressing, it was not necessary for him to insist upon the validity of that title, or else we might have expected to find a clear statement of the custom on which that title rested, but he is only concerned to answer the particular statements made by the Maharani, to which his attention had been called. But what has struck me very much in connection with this paper is this: if the custom or tradition of the family had been what the defendant represents, namely, that of brothers living in commensality, one took after the other in the absence of male issue, and that the last of such brothers would be succeeded by his widow,—the brief existence of the posthumous son is little noticed throughout the case—we should most probably have found it asserted in the petition of this Raja; for he was precisely in the position, the last of three brothers who had one after another succeeded to the *gaddi*, not young, married but with doubtful chances of male issue. Is it likely that in such circumstances he would not have served the claim of his own wife (the now defendant) as against a distant relation, with whom he does not appear to have been on any terms of intimacy? But he nowhere makes any reference to such rights, and speaks of the wife of the late Maharaja as being entitled to maintenance, according to the custom of the family, "just as other Maharanis receive," without any sort of distinction. Nor does he appear at any time

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previous to his death to have made any such statement in her favor, although he might reasonably have been expected to do so, for she was only three months advanced in pregnancy at the time of his death, and it would be, of course, uncertain of which sex the child would be.

Another very important point in the plaintiff's favor is the declaration of the Judge who tried the suit, that in that part of the country women do not inherit estates of the class to which the Ramgurh zemindari belongs. I understand the Judge to refer not merely to the district of Lohardugga in which he happened to be sitting, or that of Hazaribagh to which the suit properly belonged, but to the division or province of Chota Nagpore; and the declaration is of more importance, because the Judge is not merely the officer presiding in the Civil Court, but also the head of the district in executive matters, and necessarily versed in the political condition of the province. The times, and the present constitution of our Civil Courts, are favorable to the advancement of claims which in other days would not have been brought forward. The pretension which was faintly suggested on the death of a former Maharaja has now been set up with more boldness; but I think it has been properly overruled, and I am bound to add that, according to my own knowledge and belief in such cases, to reverse the judgment of the Court below, and to sanction the claims of the defendant, would create a most dangerous precedent, and would introduce into a large tract of country the most serious confusion and distrust.

In my judgment, therefore, the decision of the Lower Court should be affirmed and the appeal dismissed with costs.

MARKBY, J. (after stating the facts, continued):—What we have to consider is, whether the plaintiff has made out his title. If he has not, this suit must be dismissed without regard to whether the widow has made out her claim, or not.

Before considering whether the plaintiff's title is established by the evidence, I will state generally what I consider to be the nature of the claim which the plaintiff seeks to establish, and which differs in important particulars from an ordinary claim to

immoveable property. I am not aware of any definition of a raj, which will enable me to say precisely whether or not the succession in dispute in this case is properly denominated the succession to a raj. I imagine that, where that term is used, it rather represents a dignity than an estate, though it may sometimes be used to include an estate, where that estate is appurtenant to the dignity; and from the expressions which have been currently used in this family, such as "ascending the *gaddi*," "affixing the *tilak*," and so forth, I imagine that there was in this family some hereditary dignity, and this dignity has been sometimes called a raj. It is at any rate certain that the estates now in dispute are not susceptible of division, and that the persons, who under the ordinary Mitakshara law of inheritance would have been joint owners, were entitled to maintenance only. That appears to have been disputed in the Court below, but is not in dispute now. Whether this was by *kulachar*, i. e., family custom, or by local custom, or how otherwise, has not in this case been distinctly asserted. In the case already referred to, of *Koonwar, Bodh Singh v. Seonath Singh* (1), it was put by the then Maharaja on two grounds, but of course only one can exist in point of fact; and I gather that the Sadder Court considers that the custom which regulated the descent of these estates was that abolished by Regulation XI of 1793, and re-established by Regulation X of 1800. But that custom, as it exists now, is not, strictly speaking, either a family, or a local one. It is hardly what is usually called a custom at all. It is the exceptional course of descent of particular estates, not having its legal origin in any ancient usage of a family or district, but in purely financial considerations; and clearly, therefore, founded on the special permission or agreement of the ruling power. That exceptional course of descent was abolished but Regulation X of 1800 provided that the "local custom of the country" in the Jungle Mehals and other similar districts should nevertheless be continued in full force. There is no doubt that this last Regulation applies to the district where this property is situated, and the Sadder Court seems to have

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thought the succession to these estates was governed by it. But, I think, it may be considered as a matter of great doubt whether these Regulations have any application to the course of descent either of the dignity or of the estates of this family. I think it more probable that this is one of those cases in which primogeniture has been adopted, not for financial reasons regarding the estate, as in the cases referred to in Regulation XI of 1793, but for political reasons regarding the dignity which at one time was in all probability, if not regal, at least viceregal, and by its very nature, therefore, indivisible; and it appears to me that the estates are, as the plaintiff puts it in his plaint, appurtenant to the raj or as it is put by the Privy Council in the case of the Tippera Raj.—*Neelkisto Deb Burmono v. Beerchunder Thakoor* (1)—(and which comes to the same thing,) the title to the dignity and to the estate are one.

If this be the right view of this case (and I think it is so), then it is clear that the impartibility of the dignity and estates has its origin not in any custom, family or local, nor in the Regulations, but in the peculiar character of the raj itself. The question might, indeed, arise how the estates became appended to the dignity, so that they passed under one and the same title, whether by permission or agreement of the governing body, or by family or local custom. This, however, is only a matter of historical interest, because the origin of a particular course of descent is only important as assisting to clear up obscure questions of inheritance which arise under it. But in the present case the estates being appurtenant to the raj, their course of descent is, if I may so say, absorbed in that of the dignity, and may be altogether disregarded: having ascertained the successor to the raj, the succession to the estates follows. This point of view appears to me important for several reasons. In the first place we thus get rid entirely of the Regulations XI of 1793 and X of 1800, and thus of a question which appears to me of some difficulty, namely, whether, all customs being swept away in 1793, any custom except the single one of impartibility, which alone was revived in 1800, could now exist. In the next place, it identifies the present case entirely with the case of the

(1) 12 Moo. I. A., 523; S. C., 3 B. L. R., P. C., 13.

Tippera Raj,—*Neelkisto Deb Burmono v. Beerchunder Thakoor* (1)—and disposes of an argument which has been used here, as it was also used there, that the dignity and estates, though impartible, must nevertheless, in ascertaining the course of descent, be treated as the property of a joint family in which the family are joint interested: that the only exceptional right is that they are held and enjoyed by the eldest among the persons who would otherwise be entitled to hold jointly; and that on the death of a Raja, the next successor to the raj takes not as heir, but by virtue of his own previous, but suspended right. In the case before us, both parties have asserted that the application of this rule would be favorable to their claim, but the Privy Council, affirming the decision of this Court in the Tippera case—*Neelkisto Deb Burmono v. Beerchunder Thakoor* (1)—expressly hold that this is not the rule to be applied in such cases; they lay down that the principal which governs the descent in these cases is that the heir will be that person who would have succeeded under the Mitakshara law to the separate property, unless that law has been modified by custom. This mode of establishing a title may, therefore, be put out of consideration, though I shall have to refer to it again, as throwing light upon a document which has been much relied on in this case. Lastly, from this point of view, it is clear that the exceptional course of descent of the raj, so far as it is grounded on the nature of the thing inherited, will only warrant a departure from the ordinary law of inheritance, so far as the nature of that thing requires. The nature of the raj has been considered to require that it should be impartible, but it seems hardly possible to assert that the nature of the raj itself excludes any persons of either sex, if they are without physical or intellectual infirmity. If then any person is to be excluded who would, as senior in age and nearest of kin under the ordinary Hindu law, be entitled to succeed, it must be by some custom modifying still further the peculiar course of descent which has already sprung from the nature of the thing inherited. I do not understand it to be disputed that the plaintiff's title stands in need of such

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a custom: unless he can establish a custom to exclude females, he cannot succeed. Whether or not the defendant widow would then succeed is another question.

The question before us is thus reduced to this: there being an impartible dignity to which property is attached, and the succession to which is governed generally by the rules of inheritance of separate property according to the Mitakshara, have those rules been modified by any local or family custom? Such a custom the plaintiff has attempted to establish, and the question which remains to be decided in this case is, whether or no he has succeeded in doing so. If he has not, then, as it seems to me clear, his suit must fail.

I think it is unfortunate in this case that the plaintiff, who relied upon the custom, was not called upon to state it with precision. It is in my opinion next to impossible that a custom should exist, and not be capable of being so stated. To my mind it would be a sign that the custom is either obsolete, or has never been fully established, if it did not readily assume a precise form of word familiar to the minds of those amongst whom it has to be applied. No legal skill or experience is required to state a custom: it is a mere statement of fact; and nothing is more common than to find ignorant people stating customs with precision. Indeed, we shall find that none of the witnesses in this case have any difficulty in stating a custom. Very likely from the ignorance or carelessness of those who drew this plaint, it might not be therein fully stated; but I think, the Deputy Commissioner ought to have required it to be stated in a definite form or at least in one or more definite forms, when settling the issues. I do not think this would have been an unreasonable demand on the intelligence of these parties, and I think it was impossible to try this suit properly without having done so. As the issues on this point was originally drawn on the 23rd June 1868, it stood thus:—"According to the Hindu Shastras, and the customs of the Ramghur family, who among the different parties to the suit, is entitled to succeed to the raj vacant by the death of Ramnath Sing's son, Triloknath Sing." On the 19th August 1868, this issue was substituted:—"According to the Hindu Mitakshara Shastras, and the customs

of the Ramghur family and country, who, of the different parties to this suit, is entitled to succeed to the raj vacant by the death of Ratanath Sing's son, Triloknath Sing;" This, as appears from the record, included both the so-called custom as to impartibility and the custom to exclude females. Intermediately between this change in the issue, that is to say on the 14th August, ten witnesses had been examined by the plaintiff. When the issue was amended on the following day, both parties, on being asked, said they had no wish to examine their witnesses further, and the defendant then examined four witnesses. On the 17th August, the defendant widow applied for and obtained a postponement, on the ground that the insertion of the word "country" in the issue might make it necessary for her to procure further evidence. The case was accordingly postponed for final hearing to September 2nd, but it was intimated that "the other evidence now on the record would be duly examined at once;" by which I understand it to be meant that the defendant might bring in any other witnesses than those already named in her list, at any time until the 2nd of September, but that according to the irregular mode in which evidence is usually taken in this country, the examination of the witnesses already summoned would in the meantime proceed. On the same day (August 17th), notwithstanding the intimation to the contrary previously made, the 1st, 4th, and 5th witnesses for the plaintiff were re-called and re-examined. On the 27th August the plaintiff examined his 11th witness. On the 10th September the defendant called his 5th witness. Most of the documentary evidence was put in on the 19th August, but some further documents were put in on a date which is not given. My reasons for setting out at length these particulars will appear presently.

With regard to the evidence given by the witnesses, I must say I have felt very great difficulty in ascertaining what was really said by them. A printed copy has been furnished to us of what is called notes of evidence, which I suppose to be the notes taken by the Deputy Commissioner, and this is placed before us as the materials on which we are to base our decision. But it differs in many respects from the depositions taken in the vernacular by an officer of the Court below. The course taken

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on this argument, which I consider by no means a satisfactory one, has been to read the printed copy of the Deputy Commissioner's notes, correcting it by a reference, as the argument proceeded, to the depositions in the vernacular. I have found this course to be in this, as in other cases in which it has been followed, extremely embarrassing. It is not easy to follow an argument on evidence, when there is a running conflict all through, as to what the evidence is, and very difficult to decide upon evidence which we have to collect from two conflicting sources of information; and, as there may still be discussion as to what the evidence really is, I desire to make it clear on what materials my judgment is based.

(After discussing the evidence of the witnesses, and setting out the analysis of the petition of the 17th November, 1862, as above, his Lordship continued.) The only other document relied on is a return filled up by Maharaja Shambunath Sing at the request of the Agent of the Governor-General, dated the 22nd June, 1846. It relates to the succession to the raj and the Ramghur estates, and there is no mention whatever of his wife in that document as his heiress. But the plaintiff, who relies on this document, has not shown whether or no Maharaja Shambunath Sing had then a wife, and further, the form in which the information is asked for itself to some extent precludes the mention of the wife; it therefore appears to me of little value.

After much consideration, I find myself unable to arrive at the conclusion that this evidence establishes any family custom which would exclude females. I take it that, in order to establish a *kulachar*, or family custom of descent, you must at least show one of two things,—either a clear, distinct, and positive tradition in the family that the *kulachar* exists, or a long series of instances of anomalous inheritance from which the *kulachar* may be inferred. It is said in the case of *Sumrun Singh v. Khedun Singh* (1) that, “to legalize any deviation from the strict letter of the law, it is necessary that the usage should have been prevalent during a long succession of ancestors,

(1) 2 Sel. Rep., 116.

when it becomes known by the name of *kuluchar*." But I imagine that a distinct tradition in the family would supply the place of ancient examples of the application of the usage. The evidence above stated, however, fails to convince me that in this family there is any clear tradition that, by special family custom, females are excluded from inheritance. It seems to me, therefore, that the attempt to establish the family custom by evidence of reputation has failed. I very much regret that there should be a difference of opinion on this point, and I regret that we have not here the assistance of the Deputy commissioner who heard the evidence. He finds very clearly on the evidence that by family custom the *raj* is impartible. But he expresses no opinion whatever on the oral evidence of the family custom to exclude females. He seems to me to base his opinion on that point on entirely different grounds.

I will now take the evidence of cases of anomalous descent, from which the custom to exclude females is sought to be inferred. This consists of two parts: first, the uniform statement of all the witnesses that they never knew or heard of a woman succeeding to the *gaddi* in this family; and, secondly, the fact that in 1842, and again in 1862, the widow of a Maharaja was passed over in favor of a younger brother. With regard to the first part of this evidence, if we take the view that the Deputy Commissioner seems to have taken, that there is no evidence of the succession prior to Tej Sing's time, and that we must judge of the custom entirely from what has happened since that time, there is, of course, nothing in it whatever. From Tej Sing to Lashminath, son succeeded father in regular course, and the occasion for exclusion of a widow never arose; and upon the whole, though some of the witnesses seem to assert, as a matter of family history, that no woman has ever been known to succeed, yet I think the Deputy Commissioner has rightly considered that this is not to be relied on as establishing a general exclusion of females. Succession in the direct line of father and son for ten or twelve generations would not be at all extraordinary; and even if a person out of the direct line were known to have succeeded, this would be nothing, unless it were also known that the deceased Maharaja in that case left a

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widow or daughter. Moreover, looking to the condition in which this district was for many years prior to our occupation of it [see some extracts from a letter of the Collector (1)], I think it would be difficult to draw any inference of legal rights from the events of that period. It seems to me, therefore, easy to account for what the witnesses say on this point without referring it to the exclusion of females by family custom. I think, therefore, that the only reliable evidence of actual exclusion of females, who would otherwise have been entitled to inherit, is in the two modern instances. We are, however, very imperfectly informed of the circumstances under which these two ladies were excluded. In the first instance, the point does not appear to have been much contested; the second instance is so recent that it is still quite open to the widow in that case to assert her rights. Moreover, if we may judge from the petition of Ramnath, which has been already referred to, the widow of Shambunath Sing yielded not to any assertion of a custom to exclude females, but to the erroneous view which, as we have seen, Ramnath took of the nature of the rights of succession to an impartible raj,—namely, that a joint brother did succeed under the ordinary law, in preference to the widow, to property of this description. On the whole, therefore, I cannot infer any family custom to exclude females from the actual course of descent.

Then comes the question whether there is a local custom that women are excluded. I conclude from the evidence that this is the local custom relied on, though, as I said before, by a very serious error, the plaintiff was not called upon to state, before the evidence was gone into, the exact custom on which he relied. Even stated as I now state it, the custom is extremely vague, yet nothing more definite than this has been stated either in evidence, or in argument, or even in the judgment of the Court below. I do not know now in what district the custom is said to prevail, or in regard to what kind of succession, or what sort of estates. According to English law, I imagine that such a proceeding as this would not be allowed, but the

(1) 6 Sel. Rep., 134.

plaintiff would be obliged to state the district in which the custom was alleged to exist, and to confine his evidence to that district. Take, for instance, a case where a plaintiff alleges the custom of a manor; he would not in general be allowed to show what the custom was in other adjoining manors—*Duke of Somerset v. France* (1), *Marquis of Anglesey v. Lord Hatherton* (2). But as pointed out by Lord Mansfield in *Furneaux v. Hatphins* (3), he may do so if he states the custom as a general custom of the whole county (not “a general custom of the country” as this passage is sometimes quoted), a county being a well-defined and ancient division of the kingdom. So in the case reported by Lord Hale (4), the custom is laid as “the custom of that country,”—that is, the country on the borders of the river Severn [see also the observations of Lord Ellenborough in *The King v. Ellis* (5)]. So in India the custom might be laid as the custom of a zilla or other similar district. This rule appears to me to be not an artificial rule of evidence, but, as pointed out by Lord Abinger, in the case of *Marquis of Anglesey v. Lord Hatherton* (6), to be founded on good sense; because if there is not some limitation of this kind, it is plain that the custom of one district might be gradually extended indefinitely in all directions. Had the objection been taken, I think that in this case, the defendant would have had a right to require that, before any evidence of local custom was gone into, the plaintiff should state the locality to which the custom was alleged to apply.

The evidence produced by the plaintiff in support of the local custom is also most singular. The witnesses are none of them asked as to the general course of inheritance in any district, but as to what has happened in eleven specified estates, selected, as I imagine, by the plaintiff himself. In three of these only were the witnesses able to give any particulars of the descent, and it is rather remarkable that those are the very same three to which Ramanath referred in the petition I have already discussed—namely, Palganj, Kunda, and Gowan. The

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(1) 1 Str., 654.

(2) 10 M. & W., 218.

(3) 2 Cowp., 807.

(4) Harg. L. Tracts, 84.

(5) 1 M. & S., 662.

(6) 10 M. & W., 235.

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witnesses altogether refrain from stating that any local custom exists, and it is left to be inferred from those three instances of exclusion. The omission to state the locality over which the alleged custom prevails makes it difficult to deal with this evidence. All these three places are said to be now in zilla Hazaribagh; but that I imagine to be quite a modern political division. This property and a large tract of the surrounding country was originally comprised in zilla Ramghur (Regulation III of 1793, s. 2); subsequently a district was formed under the name of the Jungle Mahals, but which included no part of the zilla of Ramghur. It was formed entirely of portions of the zilla of Birbhum, Bardwan, Midnapur (Regulation XVIII of 1805); subsequently the zilla of Ramghur was abolished, and a portion of Ramghur, including these estates, a great part of the Jungle Mahals, and what was then Midnapur, were made Non-Regulation Districts, and put under the superintendence of an Agent of the Governor-General (Regulation XIII of 1833), for whom a commissioner has been since substituted (Act XX of 1854). This commissionership is now divided into four Deputy Commissionerships—Hazaribagh, Manbhum, Lahardugga, Singbhum. But these divisions have, I imagine, been made solely with reference to the convenient transaction of business, and do not correspond with any ancient divisions of the country. For the present purpose, therefore, the fact which was so much relied on, that these three estates and Ramghur are all in the same district of Hazaribagh, seems to be immaterial. It seems to me that it would be absurd to find that this was a local custom of a modern division like Hazaribagh; but if not of Hazaribagh, to what other locality is it suggested to belong? I should say that to establish a local custom to exclude females from inheritance by instances of exclusion, a district must be stated in which the custom is now, and for a long time has been, prevalent, and which includes the property in dispute. The district might be defined geographically, or it might correspond with some ancient political division. A sufficient number of instances of exclusion within that locality must then be adduced to establish that the custom extends to the whole district, and, therefore, governs the succession in

dispute. It appears to me, however, that the plaintiff in this case has entirely failed to bring the evidence up to this point. Moreover, I think, the effect of the instances given is greatly weakened by the uncertainty in which it is left, whether or no these three estates are held as ghatwali tenures. If that be so, and it is a point on which the plaintiff's witnesses are not agreed, the exclusion of females might possibly be accounted for without resorting to any such inference as the general exclusion of females in the district. Moreover, I think, the petition of Ramnath of 1864 shows clearly that he was as little aware of any local custom which would exclude females, as of any family custom to the same effect. If there had been such a local custom within his knowledge, he would certainly have mentioned it; and I think that it would be most strange if he had not then ascertained all the special rules of inheritance applicable to the question, whether peculiar to his own family, or to the district in which he resided. The Deputy Commissioner says, however, in his judgment, "that the Ramghur estate is a large feudal tenure, which is not divisible, and that it is a matter of notoriety that in this part of the country, women do not inherit such estates, they being disqualified by sex from performing all that it is incumbent on a Raja to perform." With regard to the last part of this statement there is no evidence beyond that of two of the defendants's witnesses as to the duties of the Raja: they say that it was customary for the Maharaja at times of *pūja* to sit under the umbrella and to hold catcherry outside; and that this the Rani could not do. But there is no evidence that this is an indispensable ceremony, and, like many other ceremonies usually performed by men, but not usually performed by women, it might, as far as I am aware, be omitted without any serious consequences arising. I am not sure I understand in what sense the Deputy Commissioner calls the Ramghur estate a "feudal tenure," but I shall show presently that the terms on which the Raja holds his estate are those of an ordinary zemindar. As to the notoriety of the custom, I have some doubts whether this is a matter on which a Judge is entitled to give the results of his own experience. If I am at liberty to consider this statement, I should have no hesitation in saying

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that it is the strongest part of the plaintiff's case. My chief objection to this statement is the very vague terms in which it is made. I am quite at a loss to know what district the Deputy Commissioner refers to when he speaks of "this part of the country." He may mean his own district of Lohardugga; but if so, that is nothing to the purpose, for this property is not in Lohardugga but in Hazaribagh, and this suit only came to be tried by the Deputy Commissioner of Lohardugga by an accident. Again, he seems to consider that the custom applies only where the owner of the estate has to perform duties which a woman is by sex disqualified from performing; but if so, it does not apply to the Ramghur estates, for the Maharaja has not, and never had, as far as I can discover, any such duties.

It is certainly remarkable, if there does exist a local custom to exclude females so notorious as stated by the Deputy Commissioner and covering any extensive district, that it is not noticed in any work upon the Hindu law of inheritance, either general or special, as far as I am able to discover. The custom of primogeniture as it is sometimes called, but as it is more correctly called of impartibility, as observed in this part of India, has been the subject of legislation, and has frequently been noticed by text-writers; and the succession in this very family has upon that point been more than once referred to by Strange. Jagannatha, Shama Charan Sirkar, Harrington, and Macnaghten, all refer to the custom of primogeniture, or impartibility in this locality, but not one of them speaks of the exclusion of females. Had such a custom been notorious as a local custom, I should think it must have been known to Mr. John Harrington, and had it been known to him, I think it is hardly possible that he would have omitted to mention it in that part of his Analysis where he discusses the departure from the ordinary law of inheritance which has taken place in these very districts (1). I do not, of course, mean it to be inferred that the exclusion of females from succession is unknown in India. Since this case was argued, I have seen a list of twenty-five questions addressed to certain Rajas and Chiefs in the Regulation

(1) 1 Harrington's Analysis, pp. 194—297.

and Tributary Mehals, and the answers thereto, illustrating the succession to those *gaddis*. It is clear that in those cases, if those statements are reliable (and I believe them to be so), females are excluded, if not altogether, at least to a very great extent. This district is immediately south, and almost adjoins the district of the Assistant Commissioner of Lohardugga, and his statement as to the notoriety of the custom may perhaps be thus accounted for. But it is hardly necessary to repeat that until some connection, either geographical or political, is shown to exist between the districts, there is no ground for inferring the custom of one district from its existence in another; and, as far as I am aware, the country above designated as "Regulation and Tributary Mehals" is entirely distinct from that in which the raj of Ramghur is situate, and which has been generally known as the Jungle Mehals.

The course of inheritance in the case of impartible property is, indeed, almost always spoken of as if it went entirely in the male line, but it is clear to me that this is only an adoption of the Hindu form of expression "*putra pautradi*," which is the ordinary expression which is used to indicate heritability, and which is, I believe, always understood to include females. That by the general Hindu law females are not excluded from succession to a raj is, I believe, unquestioned. In the much contested case of the Shivagunga Raj—*Katama Natchier v. The Rajah of Shivagunga* (1)—a woman eventually succeeded without its ever being suggested that any such general rule of exclusion was known to exist; see pages 589 and 605 of the report. Jagannatha says:—"If the king give the whole of his dominions to his eldest son qualified for the empire, although his other sons be void of offence, the gift is valid (2)"; he says nothing about the exclusion of females: and even in this respect, in a curious passage, at page 127, he hints a doubt whether some modern princes, who are not independent in the government of their subjects, but merely employed in levying the revenue of Government, should be considered as princes. Of course, as against clear and ample evidence that the local custom

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(1) 9 Moo. I. A., 539.

(2) Bk. II, Ch. IV, s. 15, p. 118.

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existed, or that females had been over and over again excluded, these speculations would be nothing; but I think one is justified in referring to them in the present case. The direct evidence in support of the local custom is at the very least meagre and weak, and the most valuable testimony is that of the Judge himself speaking from his own experience.

The materials at my command for testing the value of the Deputy Commissioner's opinion on this point are not very ample, but the result of such investigations as I have been able to make leads me to doubt the existence of such a local custom as is asserted. It leads me, undoubtedly, to the conclusion that there is none so notorious and so general as to be judicially noticed without proof.

There was, indeed, one argument used to which I was at first inclined to give considerable weight. It was asked by the counsel for the plaintiff, if women succeed in this district to estates of this nature, why did not the widow prove instances of it? And it was pointed out that the case was adjourned expressly in order to give her time to enquire into the custom of the country, and yet she produced no one to speak to it; whereas, prior to the adjournment, namely, on August 15th, one of her own witnesses, Beni Jaianandan Das, had stated that, in the district of Hazaribagh, no woman had to his knowledge ever succeeded to the raj. What exactly occurred with reference to this adjournment I have stated above, and it certainly does at first sight appear remarkable that, if it were possible, the defendant should not have taken this simple course of disproving the custom; and under some circumstances I should have presumed that search had been made, and that not a single instance of a female succeeding to a raj, in the immediate neighbourhood of this property at any rate, could be produced. I should still have wished to know how many persons are possessed of that dignity in that neighbourhood, and something of their history; but from the evidence I presume that there are other rajs besides Ramghar at no great distance, and it would have been necessary, therefore, to consider the effect of this inference from absence of proof on the part of the defendant. But, on consideration, I do not think it safe to presume either that such a search as I have indicated

has been made, or what would be the result of it if it had taken place. We have a very careful and accurate report from the Deputy Commissioner of all the proceedings that took place in the Court below, and we see how vague the enquiry was to which the attention of the parties was directed. As I have already remarked, I do not find either in the issues, or in any part of the proceedings, any statement on the part of the plaintiff of what local custom he intended to prove. As already pointed out, the witnesses recalled by the plaintiff on the 17th August, and the witness called on the 27th, made no assertion of any general custom; they only particularized certain estates in which women had been excluded. To this the defendant may have rested content to answer that these instances proved nothing in regard to the property in dispute, and that one of the plaintiff's own witnesses admitted them to be ghatwal estates.

Some attempt was made to show that the terms of the tenure of these estates imposed duties upon the zemindar which a woman was unable to perform. I do not think so. This appears to me to be an ordinary zemindari tenure. The patta under which the estates are held contains a clause which imposes duties on the zemindar in the nature of police duties, but it only extends to the protection of travellers, and to the arrest of criminals. These, I imagine, are the ordinary duties of a zemindar. The zemindari sanad granted by the Mogul Government to Ramjiwan, the zemindar of Rajshahye, in 1735, contains a precisely similar clause to that in the Raja of Ramghur's patta (1). and Ramjiwan was succeeded on his death by his widow the Rani Bhowani (2). There appears to me to be no analogy between these duties and those of a ghatwal, which are of a much more general character, and which are usually expected to be personally discharged.

On the whole, although I feel much diffidence in coming to a different conclusion from that of the Deputy Commissioner

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(1) See 3. Harrington's Analysis, 279.

(2) *Id.* 311; the passage is as follows:—"Ramjiwan, who long had the management of the zemindari, died about the year 1733; having previously adopted

his grandson, Ramkunt, who succeeded immediately on Ramjiwan's death, and was afterwards confirmed by sanad in 1733. The Rani Bhowani, his widow, is the present incumbent."

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upon a point of this kind, yet I cannot think that any local custom has been established with that clearness and definitiveness which would justify a departure from the ordinary rule of inheritance. Between impartibility and the exclusion of females, there is no connection whatever; and it lies on the plaintiff therefore, to establish the exclusion upon which he relies, and this, I think, he has not done. I am not prepared to say that the investigation has been a satisfactory one; and, had the law allowed it, I should for my own part have been most anxious to have had a further inquiry. But that course has not been even suggested to us, and I do not think that, on our own motion, we have power to direct it. The case is very much in the same condition as that of *Rai Manik Chand v. Madoram* (1), which was recently before the Privy Council. If the plaintiff has failed to lay before us the best evidence which might have been got, he alone will suffer. No other title ought in any way to be affected by this decision. On the evidence before me, I think no custom, either family or local, to exclude females, has been established. I think, therefore, that the plaintiff has failed to make out his title, that the decision of the lower Court ought to be reversed, and his suit dismissed with costs in this Court and in the Court below. Of course, I express no sort of opinion whatever whether or no the defendant has proved her title to any part of the property.

From the judgment of Jackson, J., which prevailed as that of the Senior Judge; the defendant appealed under cl. 15 of the Letters Patent of 1865.

Mr. Money and Mr. Ghose (with them Baboo Hem Chandra Banerjee) for the appellant.

Mr. Woodroffe (with him Baboos Annada Prasad Banerjee, Mahes Chandra Chowdhry, Rames Chandra Mitter, Abinash Chandra Banerjee, and Gopal Chandra Banerjee) for the respondent.

(1) 3 B. L. R., P. C., 5.

Mr. Money, for the appellant, took a preliminary objection, viz., that the suit had abated by reason of the plaintiff's death. His eldest son, who had been made a party in his place was not necessarily, on the death of his father, the heir to the original Raja; the suit did not survive to him;—see Act VIII of 1859, s. 100. [Couch, C.J.—The objection had better be taken at the close of the argument.]

The *onus* is on the plaintiff to prove the custom he alleges; but the only evidence he gave as to the exclusion of females from succession was that the widows of Lachminath and Shambunath did not succeed. The defendant, and not the plaintiff, is the heir according to the ordinary Mitakshara law. Jackson, J., and the Court of first instance erred in taking into consideration the customs of the old Ramghur family. Those customs cannot affect Tej Sing, who was a new man put in the place of Makuod Sing; and no sanad was ever given to him under which the customs of the old family were continued. If, however, this view be incorrect, still as the plaintiff seeks to set up a *kulachâr*, or family custom, in opposition to the ordinary laws of inheritance, he must show that the custom has obtained in the family during a long succession of ancestors—*Sumrun Singh v. Khedun Singh* (1). It must be ancient, invariable, and established by clear and unambiguous evidence—*Doe d. Jugomohun Roy v. Sreemutty Neemoo Dossee* (2), *Tara Chand v. Reeb Ram* (3), *Raja Koernarain Roy v. Dhorinidhur Roy* (4), *Baboo Gunesh Dutt Sing v. Maharaja Moheshur Sing* (5). The evidence does not show that such a custom has prevailed in the Ramghur family. The learned counsel also referred to the following cases as to custom: *Musst. Mahamaya Dibeh v. Goureekaunt Chowdhry* (6), *Russic Lal Bhunj v. Puresh Munnee* (7) *Ramgunga Deo v. Doorgamunes Jobraj* (8), *Kalerpershaud Roy v. Degumber Roy* (9), *Ranee Soomitra v. Ramgunga Manik* (10), the

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(1) 2 Sel. Rep., 116.

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(2) Clarke's Notes of Cases during 1831 and 1832, p. 101.

mal Sethurayer, 7 Mad. Jur., 254.

(3) 3 Mad. H. C. Rep., 50.

(6) 1 Sel. Rep., 236.

(7) S. D. D. for 1847, p. 205.

(4) S. D. D. for 1858, p. 1132.

(8) 1 Sel. Rep., 270.

(5) 6 Moo. I. A., 164. See also the

(9) 2 Sel. Rep., 237.

decision of the Privy Council in Rama-

(10) 3 Sel. Rep., 40.

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Tipperah case—*Noelkista Deb Burmono v. Baer Chunder*

Thakoor (1), the Pachete case—*Maharaja Gurunarain Deo v. Unund Lal Sing* (2), the Chota Nagpore case—*Thakoorai Chutturdharees Singh v. Thakoorai Telukdharees Singh* (8).

Custom must relate to a particular class of property, not to all kinds of property in a district or division. The settlement paper of chota Nagpore consists of six divisions, of which Ramghur is one. Markby, J., finds that it is a modern political division, and an appendix to the Fifth Report to Parliament shows that the ancient divisions were different (4). Custom can only apply within certain limits, or to a certain area. [Mr. Woodroffe.—The plaint gives as its local and geographical limit, that it was the custom of the family and of the highland country. MACPHERSON, J.—The appendix to the Fifth Report (4), states that Ramghur forms part of the highland district. Is not that sufficient?] Mr. Blochman proves that formerly these lands were a portion of the old Kokra country (5); at the present day some of them lie in zilla Bhagulpur, and others in zilla Monghyr. In the case of the Chakaye Mehal, which is situated in zilla Monghyr, a woman succeeded her son—*Tikait Durga Prasad Sing v. Mussamat Durga Kunwari* (6). There is a material

(1) 1 W. R., 177; affirmed by the Privy Council on appeal; 3 B. L. R., P. C., 13; S. C., 12 Moo. L. A., 523.

(2) 6 Sel. Rep., 282.

(3) 6 Sel. Rep., 260.

(4) The Fifth Report by the Select Committee on the affairs of the East India Company, p. 417.

(5) Asiatic Society's Proceedings, Part I, No. 2, p. 111.

(6) *Before Mr. Justice Norman and Mr. Justice E. Jackson.*

TIKAIT DURGA PRASAD SING
AND OTHERS (DEFENDANTS) v. MUSSA-
MAT DURGA KUNWARI (PLAIN-
TIF).*

The 5th January. 1870.

. Baboos Anukul Chandra Mookerjee and Chandra Madhab Ghose for the appellants.

Baboo Annada Prasad Bannerjee for the respondent.

NORMAN, J.—This was a suit by the plaintiff, Mussamat Durga Kunwari for possession of two-thirds, and a declaration of title to the other one-third of a zemindari mehal called Chakaye in zilla Monghyr. Her title is a very plain one.

Tikait Futsah Narayan Sing died on the 14th of Chaitra 1270, leaving three widows, Lallit Kunwari, Narayan Kunwari, and Durga Kunwari. Durga Kunwari, the plaintiff, was pregnant at the time of her husband's death, and in the month of Sraha 1270, gave birth to a son, Gurda Narayan, who lived till Chaitra 1272. On the death of Gurda Narayan, who of course, on his birth, succeeded to

* Regular Appeal, No. 133 of 1869. from a decree of the Subordinate Judge of Bhagulpore, dated the 23rd March, 1869.

difference between a raj and a mere zemindari (1). Ramghur is a zemindari and not an ancient raj; the title of raja was first con-

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the property in the entire mehal Chakaye as heir of his father, the plaintiff, as his mother and heiress, became entitled to the entirety of the mehal. She has been kept, or been put out of possession of two-thirds, by the other two widows of her husband, with one of whom at least, Lalit Kunwar, the appellant, Durga Prasad Sing, who is the third defendant in this case, appears to have colluded.

Durga Prasad Sing stands to the late proprietor Gurda Narayan, in the relation of great grandfather's brother's great grandson, and it may be that after the death of the plaintiff, he will be entitled as next heir to the property; to which, according to ordinary Hindu law, the plaintiff is entitled as mother and heiress of Gurda Narayan during her lifetime.

By his written statement, the appellant, Durga Prasad Sing, first of all set up that the plaintiff was not in possession even of the one-third share which she does not claim. He goes on to say that the plaintiff was not entitled to the estate which had belonged to her son, because the widows and minor son lived in commensality and as a joint family with him; that the entire property was ancestral; and that under the Mitakshara after the death of the plaintiff's husband and of her son, he, Durga Prasad, was entitled to the ancestral estate. Next he sets up a title that he, Durga Prasad, with the consent of the three wives of Fattah Narayan, being rightfully entitled, was installed as rightful heir by being marked with the *sik* in 1874. Further, he says that the plaintiff had gone away from her husband's house with one Ahlad Panday, and was living an unchaste life.

We proceed to consider the four defences which he sets up. He does not attempt to show that the plaintiff was not in possession of one-third of the property.

As to the second, the Sub-Judge finds that the parties were not in possession of the estate as a joint family estate. In fact, it is clearly proved that this ghatwali estate descended from the father to the eldest son, and was not held jointly, the younger sons having allowances made to them. Therefore, the second ground utterly fails.

As to the third ground, Durga Prasad Sing attempted to give evidence that there is a family custom or *kulachar*, by which in this family females were excluded from inheritance. He did not make any averment to that effect in his written statement, and therefore did not, perhaps would not, pledge himself to it on oath or solemn affirmation. He did not give the plaintiff any warning that she would have to meet any such case. No issue was raised on it, and down to the time when he examined his witnesses, and even in his written grounds of appeal before us, there is no statement of the particulars of this custom or *kulachar*, the existence of which he now suggests. He does not even aver in his written grounds of appeal that such a custom is proved. We think that it would be a great injustice to the plaintiff to raise that issue now, and to allow the defendant to come in upon an allegation as to the truth of which he has never pledged himself, and which the plaintiff has had no opportunity of meeting. We therefore decline to go into the question whether, upon the evidence as it stands there is any proof of the existence of any such custom as that now alleged by the vakeel of the defendant Durga Prasad. It is said that the plaintiff's witnesses admit the existence of a custom to exclude females. The only statement to which the learned vakeel for the defendant can point as in any degree substantiating that contention, is the statement of Alam

(1) 3 Harrington's Analysis, p. 329.

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ferred on the owners by the British Government. They must be regarded simply as zemindars. [Mr. Woodroffe.—Both the Judges below are agreed that this is a raj, and, therefore, it is not open to Mr. Money to argue that it is a zemindari—*Roy Nandipat Mahata v. Urquhart* (1), and *Shahzadi Hajra Begum v. Khaja Hossein Ali Khan* (2). COWCH, C.J.—I agree with the decision in the latter case, viz., that no point can be argued on appeal which was not argued before the Division Bench; but in *Roy Nandipat Mahata v. Urquhart* (1), Norman, J., appears to have misunderstood the ruling in *Shahzadi Hajra Begum v. Khaja Hossein Ali Khan* (2) when he held that, where two Judges comprising a Division Bench agree in their finding, the High Court has no power in an appeal under cl. 15 of the letters Patent to question that finding. Mr. Money must show that the question was raised in the Court below.] (It appeared that the question had been raised, and Mr. Money continued):—There is nothing in the nature of a zemindar's duties incompatible with female succession. A female may hold a ghatwali tenure—*Musst. Kustooree Koomares v. Monohur Deo* (3), which was a case from this particular district. Harrington speaks of primogeniture and impartibility (4); but he never mentions female exclusion.

Mr. Ghose on the same side.—The petition of Ramnath contains no allusion to any local custom. The family usage of affixing the *tilak* on the forehead of the raja-elect is alone referred to, and this usage is also mentioned in certain proceedings of the

Chand, one of the plaintiff's witnesses. who says:—"I know of no case in which women have succeeded to any *gaddi* in Chakaye." Very likely, but ignorance is not proof.

The charge that the plaintiff has been living an unchaste life has been abandoned, and, as has been shown by the Sub-Judge, has been contradicted by the widow Narayan Kunwari, whose evidence shows that there is no foundation for such a charge.

We think that the suit has been very properly decreed. We think it is evi-

dent that the defence set up is a mere fraudulent contrivance and a reckless attempt on the part of Durga Prasad Sing, a possible future heir, to defeat the rights of the plaintiff, whose title as heiress of her son is clear.

We dismiss the appeal with costs.

(1) 4 B. L. R., A. C., 181.

(2) *Id.*, 86.

(3) W. R., from Jan'y. to July 1864, p. 39.

(4) Harrington's Analysis, p. 194.

Collector, dated 1812, 1836 and 1842. In the form sent to Shambunath to be filled up, he was merely asked to give the names of the sons, who, under the then circumstances, were entitled to succeed. He could not insert the name of his wife, and at that time he had no son. The *kulachar* was not set up in the case of *Tikait Durga Prasad Sing v. Mussamat Durga Kunwari* (1) until the present case had been decided by the Deputy Commissioner. Nor was any evidence of local or family custom given in *Ranee Hingun Koonwaree v. Nundlal Singh* (2), in which case the widow succeeded. The plaintiff cannot be said to have proved his case until he has shown that there had been an instance in which a woman entitled to succeed was passed over: mere proof that no female ever has succeeded is not sufficient—*Raja Nugender Narain v. Rughoonath Narain Dey* (3) and *The Government v. Monohur Deo* (4). There is no reliable evidence of custom: most of the witnesses either know nothing, or only speak from hearsay. The plaintiff has not shown that the usage prevails in the other six zamindaris in this district. The preformance of the pujas mentioned by the witnesses is not an essential duty of the ruler; the plaintiff can sit under an umbrella in her own apartments. The idea of a female ruler is by no means new to the Hindu mind; there are many such instances in Sanscrit literature.

Mr. Woodroffe for the respondent.—There were two issues, the one relating to the devolution of the raj and estates of Ramghur, and the other to *Gaddi Khurkhur*. No reference has been made by either of the learned counsel for the appellant to the latter, and I am, therefore, not called upon to say anything with respect to it. [COURT, O.J.—Although the Judges of the Division Bench have not touched upon that point, yet, if I see, on the whole case, that that part of the judgment is wrong, I shall not allow it to stand merely because counsel have not argued it.] According to the Full Bench Ruling in *Roy Nandipat Mahata v. Urquhart* (5), I ought to have been relieved of the necessity of showing that Ramghur is a raj,

(1) *Ante*, p. 306.

(2) S. D. D. for 1867, p. 155.

(3) W. R., from Jany. to July 1864,

p. 20.

(4) W. R., from Jany. to July 1864, p. 39.

(5) 4 B. L. R., A. C., 181.

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since the Judges below did not differ on the point. [Couch, C.J.—That case, like the present one, was before three Judges; it was not a Full Bench decision, and we are not bound by it as we should be by a Full Bench ruling on a reference by a Division Bench.] Where by the Charter an appeal is given to the High Court when two Judges differ, the judgment on appeal is a judgment of the High Court, whether three, four or five Judges sit. [Couch, C.J.—It is a judgment of the High Court, and as such is binding on the parties, not on any other Court.] We ought to take it that Ramghur is a raj; it has been treated as such throughout. The succession to the dignity of a raj is exceptional, by reason of the impartibility of the dignity—*Koomour Bodh Singh v. Seonath Singh* (1), *The Secretary of State in Council of India v. Kamachee Boye Sahabu* (2), and *Baboo Gunesh Dutt Singh v. Maharaja Moheshur Singh* (3). The title of raja is not absolutely essential to the tenure of a raj—*Baboo Beer Pertab Sahae v. Maharaja Rajender Pertab Sahae* (4). The estate of a raja is not necessarily impartible—*The Court of Wards v. Rajkumar Dio Nandan Sing* (5); but if the estate be impartible, it

(1) 2 Sel. Rep., 92.

(2) 7 Moo. I. A., 476.

(3) 6 Moo. I. A., 164; see p. 187.

(4) 12 Moo. I. A., 1.

(5) *Before Mr. Justice L. S. Jackson and Justice Macpherson.*

THE COURT OF WARDS ON BEHALF OF
RAJKUMAR SHIORAJ NANDAN
SING (ONE OF THE DEFENDANTS) v.
RAJKUMAR DIO NANDAN SING
(PLAINTIFF) AND OTHERS (DEFEND-
ANTS).*

The 11th July 1871.

The Advocate-General for the appellant.
Mr. Cowie for the respondent.

MACPHERSON, J.—The main question in this appeal is as to the position of the Raja of Seohur in Tirhoot.

The contention for the plaintiff (who appears as respondent before us) is that, on the death of a raja of Seohur, the estate passes to his heirs according to

*Regular Appeal. No. 91 of 1870, from a decree of the Subordinate Judge of Tirhoot, dated the 21st December 1869.

the ordinary law of inheritance prevailing among Hindus in the Tirhoot district. The contention for the defendant (the appellant) is that the estate is impartible, and passes with the raj from raja to raja, the other members of the family being entitled to maintenance only. The Court of Wards defends the suit, and now appeals to this Court, on behalf of Raja Shioraj Nandan, whom the plaintiff admits to be the present raja. Shioraj Nandan is the plaintiff's nephew, being the elder son of the late Raja, Shio Nandan, who was the plaintiff's elder brother. Shio Nandan and the plaintiff were the two sons of Jadu Nandan, the younger brother of Raja Raghu Nandan, on whose death the raj passed to his nephew Shio Nandan. The plaintiff by his case in fact admits that he himself and his father Jadu Nandan were only "baboo," i. e., persons not entitled to a decree of the Subordinate Judge of

must be appurtenant to a raj. It may, perhaps, be divided with the consent of the heirs; but the family usage cannot

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to the raj, although standing in such a relation to a deceased raja that they rank among his immediate heirs, according to the ordinary rules of the Hindu law of succession and inheritance. While the plaintiff states in his plaint that the ordinary rules of Hindu law determine the line of succession and inheritance, so far as property is concerned in this family, he does not actually claim the full eight annas share, to which, if that law be applicable, he would be entitled. He asks for a six-anna share only, having relinquished, he says, a two-anna share in consideration of the position of his elder brother, the Raja Shio Nandan. The case for the appellant is that the property belongs to the raj, and goes with it, and is not susceptible of partition, and that there has obtained in this particular family, from time immemorial, a custom or *kulachar*, according to which the raja for the time being appoints one competent member of the family to be his successor to the *gaddi*, who, on the death of the person appointing him, becomes the *gaddi-nishin* raja, and takes the whole estate, the other members of the family being entitled merely to maintenance.

The lower Court decided in favor of the plaintiff, holding that it lay upon the defendant to prove the custom or *kulachar* alleged, and that that *kulachar* had not been proved. The Subordinate Judge has written a very careful, and, in most material respects, excellent judgment. Concurring, as I do, in nearly all of the conclusions arrived at by the Subordinate Judge, who has gone at great length into the case, it is unnecessary that I should now go through the evidence in detail.

The Subordinate Judge shows, quite conclusively, in my opinion, that the *kulachar* set up for the defence is not proved. There is certainly evidence to show that subsequent to the time of the

permanent settlement, the estate has not usually been dealt with according to the ordinary rules of inheritance and succession among Hindus; but it is clear to my mind that it has not been uniformly (if ever) dealt with according to the principle relied on by the defendant.

The custom or *kulachar* pleaded may be treated as consisting of two distinct parts:—

1. A custom according to which the raja for the time being appoints one competent member of the family to succeed him on the *gaddi* as raja; and

2. A custom according to which the entire property passes with the raj from raja to raja, the other members of the family being entitled merely to maintenance.

It is as to this latter branch of the *kulachar* that the chief contest is in this suit; but the plaintiff also denies that the rule of succession to the raj is as alleged. The plaintiff practically admits that as a matter of fact, the principal member for the time being of the family has, for generations, enjoyed the title of raja. In his plaint he states that he and "Raja" Shio Nandan were the two sons of "Baboo" Jadu Nandan deceased and nephews of "Raja" Raghu Nandan, and grandsons of "Raja" Duahtadaman; and that, although he and his brother inherited the property, under the ordinary law, in equal shares, he (the plaintiff) had relinquished a two-anna share, and contented himself with six annas only, on account of his brother Raja Shio Nandan's position. And when Shio Nandan died, the plaintiff himself wrote immediately to the authorities giving notice of the fact, and adding that, before his death, he had conferred the *titik* and *raj-riyat* on his son Raja Shioraj Nandan (the defendant in this suit). On the evidence generally, too, there is no doubt that the principal member of the family has, for many generations, enjoyed the title of

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be broken without such consent—*Ranee Hursoondree Dabee v. Rajah Bishennath Singh* (1). The defendant admits that

raja. It was not until the year 1859 that the title was formally and expressly granted by the British Government. In that year Lord Canning formally conferred the titles of raja and bahadur on Shio Nandan, who in the *sansad* is addressed as "Raja" Shio Nandan, nephew of "Raja" Raghu Nandan, deceased. But while admitting that the principal member of the family, for the time being, enjoyed the title of raja, the plaintiff does not admit that the *kulachar* as to the succession to the *gaddi* was such as is represented by the appellant. The *kulachar* pleaded is simply that the existing Raja, or *gaddi-nishin*, nominates a competent member of the family, and that the person nominated succeeds. The evidence on the record, however, does not prove that this is the *kulachar*. Under the circumstances, it is not necessary that I should determine in what precise manner the succession to the raj, as independent of and separate from the property, has been regulated. If I had to determine it, I should probably declare that, whether competence ever properly entered into the question or not, the general rule was that the *gaddi-nishin* (or whoever else had the power of appointing) nominated, and was bound to nominate, the eldest or other son, and, failing son, the eldest or other nearest nephew. Mere competence clearly had little (if properly anything) to do with it. The Raja of Benares, who is a relative of the Seohur family, and who has been at times more or less mixed up in its affairs, was examined as a witness for the defence, and his evidence is much relied on by the appellant. But he speaks to a *kulachar* not such as is pleaded, but one simply by which the property would keep in the direct male line, the eldest son succeeding first; failing sons, the eldest nephew, and so on. Moreover, we find that both the plaintiff and the defendant Shioraj Nandan are obliged to make title through Raja Dushtadaman, [who neither was the

direct male heir of the last preceding Raja, nor was nominated by him. Raja Dushtadaman was nominated by the widow of Raja Srikrishna some considerable time after the death of the latter. Srikrishna died leaving Ganga Prasad, his elder son, and Dushtadaman, his second son. On Srikrishna's death, Ganga Prasad succeeded to the raj, and died shortly afterwards, leaving two sons, Din Dayal and Gauri Nath. Ganga Prasad apparently made no nomination of a successor. At any rate, when he died his sons were both of them passed over, and their uncle Dushtadaman took up the raj. This he did under a letter of appointment from the widow of Srikrishna. In this letter the widow recites that, on Srikrishna's death, she had given the *tilak* to his son Ganga Prasad to be raja. Then she says:—"Ganga Prasad has since died, and his son has little sense, and is unqualified. Therefore, agreeably to the decision of my relations, pandits, panch, and neighbours, old faithful servants, and other persons, I have given the *tilak* of the *raji* to 'Raja' Dushtadaman, &c." This Dushtadaman it was who nominated and was succeeded by Shio Nandan, who nominated and was succeeded by the defendant, Shioraj Nandan. Ganga Prasad died about 1810, Dushtadaman about 1819, Raghu Nandan about 1851, and Shio Nandan in May 1867. These facts as to the appointment of Dushtadaman to succeed to the raj show that the succession did not go always, as alleged by the defendant, necessarily by nomination by the *gaddi-nishin*, also that it did not invariably go in the manner indicated by the Raja of Benares. Altogether on the evidence, the greatest uncertainty exists as to any *kulachar* regulating the succession of the raj. There being this uncertainty as to so much of the alleged *kulachar* as relates

(1) S. D. D. for 1847, p. 339; S. C. 2 W. R., 81.

the rule of primogeniture obtained in this family: but primogeniture means the primogeniture of males; the case of *The*

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to the right to succeed to the raj, the case seems to me to be even more unfavorable to the appellant on the second branch of the alleged *kulachar*, as to the impartibility of the estate. In my opinion it is proved distinctly that the estate is not impartible, but that, on the contrary, it has been frequently divided. It is not disputed that a century ago, the estate, as held by Raj Sing (through whom both parties claim), comprised the four pergunnas, Majwa, Samraon, Mahesi, and Babra. Gaj Sing had six sons, of whom (as the others died without issue) I need name only Dalip, Parthi, and Satrajit. His eldest son Dalip succeeded to the raj, and Dalip was succeeded by his son Dhurup. Dhurup had no son, but had a great grandson named Bir Kishor (the son of a son of a daughter of Dhurup). Raj Srikrishna, whom I have already mentioned, was son of Parthi (the second son of Gaj Sing), and therefore was a first cousin of Dhurup, by whom he was appointed raja by a deed of gift dated apparently in 1199 F. (1782). In this deed of gift, I perhaps ought to mention, Dhurup describes Srikrishna as "my first cousin, who would be entitled, on my demise, to succeed to the raj and property under rightful title." Satrajit, the third son of Gaj Sing, had (amongst others) a son named Abdhut. The family standing thus, and the four pergunnas, Majwa, Samraon, Mahesi, and Babra, having originally belonged to Gaj Sing, we find that, at the time of the permanent settlement, the two pergunnas of Majwa and Samraon were settled with Bir Kishor, the great grandson of Dhurup, whose heirs are now known as the Bettiah Rajas, and still hold these two pergunnas, which were thus settled with Bir Kishor. At the same time the remaining two pergunnas, Mahesi and Babra, were settled with Raja Srikrishna (son of Parthi) and Abdhut (son of Satrajit) in shares of eight annas each.

Nothing can show more conclusively than this, that, at the time of the per-

manent settlement, the property was not treated as impartible. And the constant litigation which has gone on, I may say from that time to this—carried on by various members of the family, claiming shares in the estate, and claiming them successfully,—shows that it never was accepted or acknowledged by the family as a body, although it may have been asserted that the property was impartible and belonged to the raja alone. In addition to this, we have the fact, not denied by the appellant (and at any rate well proved), that the plaintiff acted jointly with his brother, the late Raja Shio Nandan, in the management of the affairs of the estate, his name appearing in leases, bonds, &c., exactly as if he were that which he says he was, a co-sharer with the raja.

It was contended that, if it was proved that there had been a raj of Seohur for generations, it necessarily must be held that the property was impartible. But the mere fact that the principal member for the time being of the family has enjoyed the title of raja, does not necessarily lead to the conclusion that, as a matter of law, the property held by the raja is impartible, and descends otherwise than according to the ordinary rules of Hindu law. There is no authority for saying that it does. In every case in which a departure from the ordinary law of succession and inheritance is relied on, a particular custom or *kulachar* must be proved. There is no one rule that I know of which applies to all Hindu rajas and their estates. The evidence given by the numerous witnesses examined was gone into very fully by the Advocate-General. But, looking at the whole case, I have no doubt whatever, that the Subordinate Judge was right in holding that the plaintiff was entitled to a six-anna share of the estate held by him and Shio Nandan, and that it was not proved that the estate was impartible

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Widow of Raja Zorawur Singh v. Koonwur Pertee Singh (1) and
Mussamut Maharanee v. Benee Pershad Rai (2) are instances

The letters and petitions written by the plaintiff immediately after the death of his brother Shio Nandan have been pressed upon us as showing that, at that time, it had not occurred to the plaintiff to set up any claim, and as showing that he considered that the whole property passed with the raj. In my opinion, the acts of the plaintiff show no more than this, that he wished his nephew Shioraj Nandan to be acknowledged as raja in succession to his father, and that he wished himself to be acknowledged as his guardian during minority, under an alleged appointment by Shio Nandan. I do not see anything whatever in his letters or conduct at that time to show that he deemed himself to have no share in these estates. It is true he does not claim any share expressly: and it is quite possible that, if he had been recognized as guardian, so that things could have gone on pretty much as before, with the mere substitution of the name of Shioraj Nandan for that of Shio Nandan, no express claim and no dispute would ever have been heard of. Then it is said that the suit should, in fact at any rate, have been dismissed: because the plaintiff merely seeks a declaration of title, alleging himself to be in possession. But there is nothing in this objection, as the Subordinate Judge has shown. This is no ordinary case of a purely declaratory suit. The Collector, acting on behalf of the minor, denies the plaintiff's title, and has contested it, in every possible manner, in Court and out of it, and prevented him from collecting rent. Finally, he, in August 1868, wrote to him and bid him bring a suit to establish his right, if he had any. Under such circumstances, it scarcely lies in the mouth of the Collector to ask us to dismiss the suit as premature, and unnecessary, and informal.

The decree of the lower Court must, no doubt, be amended so far as it declares

the value of the moveable property, without having any evidence before it on the subject. If necessary, there ought to be a further inquiry as to the value (in detail) of the moveable property, to a six-anna share of which the plaintiff is entitled. I understood Mr. Cowie, however, to say that the plaintiff was content to have a mere declaration of his right to a six-anna share, and did not insist on any specific declaration of value, or on a partition for the present. Unless the parties insist upon it, we shall not order any further inquiry, but shall merely amend the decree by limiting it to a declaration of the plaintiff's right to a six-anna share of the moveable property i. e., of the items admitted or specified in the decree, and of such other moveable property (if any) as there may be. The decree will not be altered as regards the immoveable property.

I see no reason why this amendment of the decree should affect the question of costs. The appeal really has been on the question of title—the one important issue—and the respondent is entitled to his full costs.

I observe that Rudraj Nandan, the younger brother of Shioraj Nandan, was a defendant in this suit, and appeared by his guardian. The guardian has chosen to put in a written statement, supporting the defendant's case, and alleging that "baboo" have no interest in the estate beyond their right to maintenance. As Rudraj Nandan is himself only a "baboo," it is clearly against the minor's interest that his guardian should file such a statement on his behalf. The guardian who filed such a statement in fact committed a breach of duty towards her ward. If she did not choose to join actively with the plaintiff, she was at the least bound to have left the case in the hands of the

(1) 4 Sel. Rep., 57.

(2) *Id.*, 62.

of the exclusion of females as a result of the right. So in the case of the *Polliam* tenure of Southern India, the Privy Council held that a *Polliam* is an ancestral estate of the nature of a raj; and although it may belong to an undivided family, yet it is not subject to partition. It can be held by only one member of the family, who is styled the *Polligar*. The other members of the family are entitled to maintenance. The succession is to the male cousin of the *Polligar* last seized in preference to his widow—*Nuraguntty Lutchmeedavamah v. Vengama Naidoo* (1). The defendant must prove that, by family custom, a female can succeed to the raj. Now indivisibility is a consequence of primogeniture; but if the mother succeeds, the daughter must succeed, and if there are several daughters either all will take as co-parceners, in which case the indivisibility is lost, or the custom must be that the eldest alone shall take; but no such custom has been proved. The succession of females is exceptional, and depends upon particular texts—*Kalidas Das v. Krishan Chandra Das* (2) and *Nobin Chunder Chuckerbutty v. Issur Chunder Chuckerbutty* (3).

Where a woman succeeds, she does not take as heir: the heir is traced from the husband when a widow succeeds, and from the son when the mother succeeds. In like manner, when a widow or mother takes on partition, the next heir is traced from the male after whom she took. The *Mitakshara*. Chapter II, s. 1, cl. 25, says:—‘The text of Narada which declares the dependence of women, ‘a woman has no right to independence,’ is not incompatible with their acceptance of property; even

Court, and was not justified in adopting a line manifestly opposed to the interests which she was placed upon the record to defend. That the guardian of Rudraj happens also to be the mother of Shioraj does not justify her, or affect the question of her duties as guardian of the younger son. In a suit in which it is not necessary for a minor defendant to take an active part, no guardian is ever justified in taking any step prejudicial to his ward. If he can do nothing positively for the minor's benefit, he ought simply to leave the matter to the Court.

JACKSON, J.—I concur in this judgment. I think it clear that the *status* of the family had none of the characteristics of a raj, and that the head of it became a raja in fact and truth for the first time when the title was conferred by Lord Canning; and I think the proof of the alleged *kalachdr* quite failed.

I concur also in the observation made as to the proceedings of the guardian to the minor brother of the present Raja.

(1) 9 Moo, 1. A., 66.

(2) 2 B. L. R., 103; see. p. 111

(3) 9 W. R., 505; see. p. 508.

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admitting their thralldom." Menu, Chapter V, vv. 147 to 151, mentions her dependance on males in various orders. The woman remains in a state of thralldom to the next male heir, which is incompatible with the position of a ruler. Markby, J., was in error in saying that Ramjiwan, the zemindar of Rajshahye, was succeeded by his widow Rani Bhowani. Ramjiwan was succeeded by his grandson Ramkunt, whom he had adopted; Rani Bhowani was the widow of Ramkunt, and not of Ramjiwan, and on Ramkunt's death, Rani Bhowani did not succeed; she entered into possession of the estate, upon the death of her son Ramkishen, as guardian of his son; see 3 Harrington's Analysis, 311; *Ranee Kishtomones Debea v. Kashes Soondes Debea* (1), and the same case under the name of *Maharanee Kishen Mones Debia v. Kashi Soondures Debia* (2). Mr. Money said that Ramghur is only a semindari, but that will not affect the impartibility. None of the cases make any difference between a sovereign raj and a dependent raj, and the succession in large semindaris or in estates like *Polliams* may be governed by the same rules as regulate the succession to a raj—2 Colebrooke's Digest, p. 119; 1 Strange, Ch. 9, p. 198; Vyavashta Darpana, p. 12, *Baboo Beer Pertab Sahes v. Maharaja Rajender Pertab Sahes* (3); Then it is said that no sanad was given to Tej Sing when the ancient estate of Ramghur was granted to him; but in the case last cited the Privy Council held that, in the case of a grant of an ancient estate by the *vis major* of the ruling power, the grant carries with it the incidents of the old family tenure, unless there is evidence of a contrary intention on the part of the grantors; see also *Khajah Assanoollah v. Obhoy Chunder Roy* (4). The successive pottas to Tej Sing and his descendants describe them as "rajas." But apart from any rights arising from the impartibility of the estate, I contend that this, being an ancient raj, is not inheritable by females. In the *Shivagunga case—Katama Natchier v. The Raja of Shivagunga* (5) their Lordships say the appellant may recover the semindari, but with-

(1) S. D. D. for 1857, p. 1126.

(3) 12 Moo. I. A., 1.

(2) W. R., F. B. R., from July 1862 to July 1864, p. 107.

(4) 13 Moo I. A., 317.

(5) 9 Moo. I. A., 59, at p. 617

out prejudice to the rights of the appellant and her sisters *inter se*. This may seem to militate against my view, but it is explained in the case of *Jowala Buksh v. Dharum Singh* (1), where their Lordships state that it was admitted that this would not have been the course of descent according to the Mitakshara if the property had been ancestral; and proceed to say that the reason why they preferred the title of the daughter to that of the nephew of the last possessor was that the Shivagunga raj was the separate acquisition of the deceased, and, therefore, passed according to the canon which regulates the descent of separate property, and not according to that which determines the succession to the joint or ancestral property of an undivided family. The same reason for the decision in the Shivagunga case is given in *Raja Suraneni Venkata Gopala Narasimha Row Bahadoor v. Raja Suraneni Lakshma Venkama Row* (2). Mr. Ghose mentioned two cases, in which a female succeeded, but in the first, *Tikait Durga Prasad Sing v. Mussamat Durga Kunwari* (3), the Judges declined to go into the question whether, upon the evidence as it stood, there was any proof of the existence of the alleged custom; and in the second case, *Ranee Heengun Koonwari v. Nundlal Singh* (4), one of two brothers died leaving a widow; the other brother claimed under a deed of renunciation: the deed was disbelieved, and no family custom was proved. The third ground is, that this property, and the persons claiming it, are subject to the Mitakshara law, and that the defendant, therefore, cannot inherit. In *Bhya Ram Sing v. Agar Sing* (5), the Privy Council deals with the question of the preference of males under the Mitakshara law: the principle there followed is the same as in *Thakur Jibnath Sing v. The Court of Wards* (6). A family continues joint until it has expressed a wish to be separated. The law of succession follows the nature of the property and of the interest in it—*Katama Natchier v. The Raja of Shivagunga* (7). In Tej Sing's time the Ramghur estate was indivisible, and it has not since then been

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(1) 10 Moo. I. A., 511, at p. 534.

(5) 5 B. L. R., 292.

(2) 13 Moo. I. A., 113, at p. 140.

(6) *Id.*, 442.(3) *Ante*, p. 306.

(7) 9 Moo. I. A., 539; see p. 610.

(4) S. D. D., 1857, p. 155.

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made divisible. On the death of Tej Sing all his sons took an interest by the Mitakshara law of descent, but by custom the eldest alone took the raj. The plaintiff's witnesses not only say that they never heard of a woman succeeding, but they positively state that the custom is for the eldest son to succeed. [COUCH, C. J.—The weak point in your evidence appears to be that, from Tej Sing's time to the present day, there has been no case in which a woman was entitled to succeed, but was passed over. The evidence of tradition in the family is very vague; the witnesses were not properly examined.] The natural inference from the fact that no woman ever has sat upon the *gaddi* is that no woman could do so. It is not necessary to enquire at the present day what the duties of a zemindar formerly were; where a grant with emoluments is made to a person for services to be performed, the grant does not cease to exist when those services are no longer needed.—*Forbes v. Mir Mahomed Taki* (1). The case of *Musst. Kustoorees Koomares v. Monshur Deo* (2), therefore, proves nothing. It is not the peculiar nature of the ghatwali tenure, but the custom of primogeniture in the Balaghat district which precludes females from inheriting such tenures in Balaghat; see the decisions of 1845 and 1852 mentioned in Colonel Dalton's Report.

The plaintiff sued the Court of Wards, who are in possession. The Maharani's claim is somewhat in the nature of an interpleader suit; the *onus*, therefore, is not more on the plaintiff than on the Maharani. [COUCH, C. J.—The plaintiff sues to establish his right to the raj; he must prove his case.] I submit that the evidence given by him has sufficiently proved his case.

If the preliminary objection taken by Mr. Money be good, his appeal must be dismissed. Ram Narayan was alive at the time of the decree and also of the appeal from which this appeal arises.

Mr. Money, in reply.—Ramghur was an ancient zemindari, and as such it was impartible; it was not an ancient raj. It does not follow from the impartibility that females are excluded, any more than the exclusion of females is a necessary consequence of the

(1) 5 B. L. R., 529.

(2) W. R., from Jany. to July 1864, p. 39.

impartibility of a borough-English tenure. Nor does the rule of primogeniture necessarily exclude females,—the word simply means seniority of birth. The present case is on all fours with the Shivagunga case—*Katama Natchier v. The raja of Shivagunga* (1). The estate of Tej Sing was a new self-acquired estate. The purchaser of an estate does not take it subject to the usages prevailing in the family of its former proprietor—*Gopal Dass Sindh v. Norotum Singh* (2). [COUCH, C.J.—To make this like the Shivagunga case, the estate should have been acquired by Ramnath.] It makes no difference whether the husband or the ancestors of the husband acquired it. The mother's propinquity to the son is greater than the father's, she therefore, takes the property. The plaintiff lived separate and apart from the defendant's husband, and on this ground his claim must fail—*Radkishor Rai v. Widow of Santoodas* (3).

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The judgment of the Court was delivered by

COUCH, C.J. (His Lordship, after briefly stating the facts, continued):—The question at once arises what was the nature of the estate granted to Tej Sing, whether it was a fresh grant of the family raj with its customary rule of descent, or a grant of the lands formerly included in that raj to be held as an ordinary zemindari. To this the judgment in the Privy Council in *Baboo Beer Pertab Sahes v. Maharaja Rajender Pertab Sahes* (4) is closely applicable. There, at page 34 of the report, it is said:—"There was not in this, as in the *Shivagunga* case (5), a new sanad. We have no evidence of the intention of the grantors except that which is to be collected from the proceedings and correspondence already referred to; nor have we any record of the proceedings before the Governor-General, or any means of knowing the precise grounds on which Lord Cornwallis's Government rejected the recommendation of the Board of Revenue, and determined to confer the property on Chutterdharee Sahes. Again, it cannot be denied, that in these pro-

(1) 9 Moo. I. A., 539.

(2) 1 Sel. Rep., 72.

(3) *Id.*, 13.

(4) 12 Moo. I. A., 1.

(5) 9 Moo. I. A., 539.

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ceedings the term 'raj' is never used, or that in some of them the subject of the grant is spoken of as 'the land in Hunsa-pore which belonged to raj Futteh Sahee.' On the other hand, there is no expressed intention to alter the nature of the tenure. The estate, whilst it was in the hands of the company, had never been broken up. The policy of the decennial settlement was to form a body of landholders, by ascertaining in whom the zemindari interest in the soil actually was, and making with those persons a permanent settlement of the Government revenue, so as to give them greater fixity of tenure.' Lord Coruwallis's Government determined to set up Chutterdharee Sahee as the zemindar with whom the settlement in respect of this property should be made. But the estate of a zemindar was not merely the right to the possession or enjoyment of certain lands. It involved rights against, and corresponding obligations to, dependant talukdars, or other under-tenants, royts of various classes, and others; and the decennial settlement, as a reference to the rules re-enacted by Regulation VIII of 1793 will show, proceeded upon an inquiry into all or many of these particulars. In the absence of all evidence to the contrary, it must be presumed that the settlement was made precisely as it would have been made had the estate continued in the line of Raja Futteh Sahee; and, therefore, that the subject conferred on Chutterdharee Sahee was the old zemindari with all its incidents, excepting at most its descendible quality. It seems to follow, that the intention to alter that quality, if it existed, would have been expressed. Again the selection of a member of the old family, the next in succession to the excluded line, though it cannot make ancestral that which was self-acquired, is a very strong circumstance in favor of the hypothesis that the intention of Government was to restore the zemindari as it had existed before the confiscation or attachment, making no further change than was involved in the forfeiture of the rights of Raja Futteh Sahee and his descendants, and in the substitution, by an act of power, of the person next in the order of succession, and consequently that the transaction was not so

much the creation of a new tenure, as the change of the tenant by the exercise of a *vis major*." The present case is stronger in favor of this view of the grant, as the ten years' settlement was made by the Government with the eldest son of Paresnath Sing, there being other sons living, which would not have been right if it had been an ordinary zemindari the property of the undivided family. But this not all. [His Lordship here stated the effect of the decision in *Keonwur Bodh Sing v. Seonath Singh* (1) as given above, and proceeded.] We have no evidence in the case of the custom or usage of the family before the grant to Tej Sing; but the want of it is supplied by this decision, which declared the estate to be impartible, the decision being pronounced in a suit between persons who are in privity with the plaintiff and defendant in this suit.

Having arrived at the fact that this is an impartible estate, we have to consider whether the defendant, a female, can succeed to it to the exclusion of the plaintiff, who is the nearest male heir. Where a family is governed, as this family was by the law of the Mitakshara, by which, in an undivided family, females do not inherit as long as there are any male members of the family, it is improbable that a custom that females should inherit to the exclusion of males would grow up with, and form part of, a custom that the eldest male member of the family should inherit. The object of the latter custom would be fully attained without the other, and there is no necessary connection between them. Before considering the evidence in this case, it will be convenient to refer to the decisions which are applicable to it.

In *The Widows of Raja Zorawur Singh v. Koonwur Pertee Singh* (2), the widows of Zorawur Singh sued his brother to recover possession of an estate in the Jungle Mehals, alleging that by the custom of the family, of the Pergunna Jarria, and of the other jungle estates, the eldest son of the late incumbent took the whole estate, the other sons receiving lands for their support; and that, in the event of the zamindar leaving no son, his widow took the estate to the exclusion of his brothers. A deed of gift

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(1) 2 Sel. Rep., 92.

(2) 4 Sel. Rep., 57.

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by Zorawar Singh to the plaintiffs, who were his second and third wives, was also set up. The Provincial Court of Calcutta, in which the suit was brought, put a question to the pandit of the Court, with directions to give an answer according to the *shastra* as current in the Western Provinces; and the answer was that the gift, if made, was not valid, and the right of inheritance in the estate vested on the death of the donor in his two brothers. The Provincial Court of Calcutta having dismissed the claim of the plaintiffs, they appealed to the Sudder Dewanny Adawlut. One of the Judges there, upon considering the whole case, held that the decision of the Provincial Court should be reversed; but the other two held it to be proved that the estate had always gone to the chief male heir, and confirmed the decision of the Provincial Court. In this case, the estate was ancestral, and the family undivided, and the impartibility of the estate only interferes with the ordinary law so far as to make it pass to the chief of the male heirs. In *Naragumty Lutchmeedavama v. Vengama Naidoo* (1), the estate which was the subject of the suit, was a *Polliam*, a tenure known in Madras. It was an ancestral estate of the nature of a *raj* not subject to partition, and could be held by only one member of the family who was styled the *Polliigar*; and it was held that, being an ancestral estate, the succession vested in the nearest undivided male cousin of the *Polliigar* last seised, who died without issue male, in preference to his widow. It appears in the judgment, page 86 of the report, that this was the opinion of the pandits who were consulted by the Sudder Court; and that it was adopted by the Court, and no objection was urged to it on the appeal, the ground taken being that it was not an ancestral estate, nor were the parties in the suit members of an undivided Hindu family. The answer of the pandits, page 74, shows that the ground of their opinion was that all the members of an undivided family have a joint right in their ancestral property, although only one of them, being capable, continues in possession thereof. The case of *The Collector of Madura v. Verracadoo Umml* (2) is clearly distinguishable from this, and was decided

(1) 9 Moo. I. A., 86.

(2) 9 Moo. I. A., 147.

upon its own peculiar facts. Markby, J., referred to *Katama Natchin v. The Rajah of Shivagunga* (1), as an instance of a woman succeeding to a raj, and near the end of his judgment said, that between impartibility and the exclusion of females, there is no connexion whatever. That need not be disputed. It is not upon the impartibility of the estate, but upon the family being undivided, and the law of succession to ancestral undivided property, that the exclusion of females rests. This appears clearly in the *Shivagunga* (1) and subsequent cases. The zemindari of Shivagunga was created in 1730 by the Nabab of the Carnatic; and by a proclamation of Lord Clive, dated the 6th of July 1801, the Government transferred the zemindari, which it appeared was treated as an escheat for want of lineal heirs, to Gowery Vallabha Taver, who was collaterally descended from the progenitors of the first zemindar. By a sanad, dated the 22nd of April 1803, the zemindari was confirmed to him in perpetuity, with power to transfer it by sale or gift, on payment to the Government of a permanent annual jumma. By the decree appealed from the son of Oya Taver, the elder brother of Gowery Vallabha Taver was held entitled to the zemindari in preference to his surviving widow, on the ground that they were undivided brothers. In the judgment of the Judicial Committee, page 605 of the report, it is said that the substantial contest was whether the zemindari ought to have descended in the male and collateral line, and the determination of that issue depended on the answers to be given to one or more of the questions:—*First*, were the brothers undivided, in estate, or had a partition taken place between them? *Second*, if they were undivided, was the zemindari the self-acquired and separate property of the younger? And if so, *third*, what is the course of succession, according to the Hindu law of the South of India, of such an acquisition, where the family is in other respects an undivided family? From these questions, it is clear that the *Shivagunga* case (1) was different from the present; and the decision in it is not applicable. But the law applicable to it is stated in the judgment at page 589 of the report, where it

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is said that "if the zemindar, at the time of his death, and his nephews were members of an undivided Hindu family, and the zemindari, though impartible, was part of the common family property, one of the nephews was entitled to succeed to it on the death of his uncle." We have thought it right to refer to this case at some length on account of the reference to it in Markby, J.'s judgment. Another authority for the exclusion of females, where the property is ancestral and the family undivided, is in the judgment of the Privy Council in *Jowala Buksh v. Dharum Singh* (1), where it is said that Lal Sing, a nephew, whose legitimacy was disputed, if the legitimate male heir of the great ancestor, would have taken the raj on the death of his uncle to the exclusion of the widow, the property being assumed to be ancestral and the family undivided; that in the case of *Katama Nat-chier v. The Rajah of Shivagunga* (2), it was admitted that this would have been the course of descent according to the Mitakshara if the property had been ancestral; and that the reason of that decision was that the Shivagunga raj was the separate acquisition of the deceased. And in the judgment of the Privy Council in a latter case, *Rajah Suraneni Venkata Gopala Nurasimah Row Bahadoor v. Rajah Surhneni Lakshma Venkama Row* (3), it is again said that, in the Shivagunga case (2), the impartible zemindari was shown conclusively to have been the separate acquisition of the person whose succession was the subject of dispute, and the ruling of the Court was, that in that case the zemindari should follow the course of succession as to separate property, although the family was undivided, but that if that zemindari had been shown to have been an ancestral zemindari, the judgment of the Board would, no doubt, have been the other way. There is, however a judgment of the Privy Council, which is referred to by Markby, J., as the Tippera case, in which a different view is taken, and which we are unable to reconcile with the previous decisions. In *Neelkrishna Deb Burmono v. Beer Chunder Thakoer* (4), their Lordships say at page 540 of the report:—"Still when a raj is enjoyed and inherited by one sole member of a family, it

(1) 10 Moo. I. A., 511, at p. 533.

(3) 13 Moo. I. A. 113, at p. 140.

(2) 9 *Id.*, 539.

(4) 12 *Id.*, 523; S. C., 3 B. L. R., P. C.,
3; see p. 13,

would be to introduce into the law by judicial construction a fiction, involving also a contradiction, to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of co-parcenership. The truth is, the title to the throne and the royal lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest; for claims to an estate in lands and to rights in others over it, as to maintenance for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, were it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir." But in a later case, we find their Lordships adhering to the law laid down in the earlier cases. In the judgment in *Stree Raja Yanumula Venkayamah v. Stree Rajah Yanumula Boochia Vankondora* (1), after stating that the question upon which the parties in the suit joined issue and went to trial was, whether the family of which the plaintiff and the appellant's husband were members was an undivided or a divided Hindu family, and that the Courts below had properly decided that issue in favor of the plaintiff,—they say: "Accordingly, the strength of the argument of the learned counsel for the appellant has been directed to show that this case should be governed by that in the ninth volume of Moore's Indian Appeals, which is generally known as the *Shivagunga* case (2). They have gone so far as to argue that the estate in question in this case being impartible, must, from its very nature, be taken to be separate estate, and consequently that, according to the decision in the *Shivagunga* case (2), the succession to it is determinable by the law which regulates the succession to a separate estate whether the family be divided or undivided. The authority invoked, however, affords no ground for this argument. The decision in the *Shivagunga* case (2) will be found

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(1) 13 Moo. 1. A., 333.

(2) 9 Moo. 1. A., 539.

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to proceed solely and expressly on the finding of the Court that the zemindari in question was proved to be the self acquired and separate property of Gowery Vallappa Tayer." And after quoting from the judgment, they say: "It is therefore clear that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate. And their Lordships apprehend that, if they were to hold that it did so, they would affect the titles to many estates held and enjoyed as impartible in different parts of India." And in observing on the evidence as to the estate being the separate property of the appellant's husband, they say:—"These grants, by way of maintenance, are, in the ordinary course of what is done by a person in the enjoyment of a raj for impartible estate, in favor of the junior members of the family, who, but for the impartibility of the estate, would be co-parceners with him." This judgment is closely applicable to the present case. There is here an ancestral impartible estate and an undivided family; for there is no proof that the family of Tej Sing had become divided, and no issue was raised as to that. If there had been no evidence of custom in the case, we should have held, upon the authority of the decisions we have referred to, that the plaintiff is entitled to succeed to the estate.

The evidence, oral and documentary, is fully stated in the judgments in the Division Court, and it is not necessary to re-state it. It shows that, on the only occasions since the grant of the estate of Tej Sing, when a female might have inherited, she was excluded. It is true that, in both cases, a brother succeeded in preference to the widow of the deceased, but this could only be justified by the family being an undivided one; and the undivided family was not that of Sidnath Sing, the father of the brothers, but of Tej Sing, of which family the plaintiff is a member. And that this succession was not allowed, as was argued by the appellant's counsel, because a brother was to succeed, is, we think shown by the return made by Shambunath Sing on the 25th June 1846, in which he acknowledged the plaintiff as heir next in succession to his surviving brother Ramnath. The plaintiff's claim is, therefore, supported by such

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evidence as there is of a custom in the family. It does not, in our opinion, depend upon a local custom, and probably the instances which appear to be evidence of a local custom may all be explained by the rule of law which, we think, is established by the authorities we have quoted. The judgment of Markby, J., for the defendant appears to be founded on the assumption that the succession was governed generally by the rule of inheritance of separate property according to the Mitakshara, treating separate as if it were self-acquired, and this is supported by the judgment in the Tippera case—*Neelkristo Deb Burmono v. Beerchunder Thakoor* (1) ; but all the other authorities appears to show that this is not correct. Where the property is ancestral and the family undivided, a custom modifying the law must be a custom to admit females, not a custom to exclude them. In our opinion, the plaintiff is entitled to succeed to the estate.

Nothing is said in the judgments in the Division Court about the Khurkhur property, and the judgment of the lower Court as to that was confirmed apparently without any difference of opinion between the learned Judges. It has not been argued before us that this part of the decree is erroneous. The lower Court found that the defendant had not proved her right to this property ; and assuming that this question is before us in the present appeal, which we think it is, having been raised by the grounds of appeal to the High Court, and by the grounds of the present appeal, we cannot consider the evidence of the mohurir of the defendant as sufficient. On a question of fact, we think we ought to be guided by the rule of the Privy Council, where there have been the decisions of two Courts to the same effect.

We think the appeal should be dismissed with costs. The decree of the lower Court will thus be allowed to stand.

Appeal dismissed.

(1) 12 Moo. L. A., 523; S. C., 3 B. L. R., P. C., 13.

[ORIGINAL CIVIL.]

Before Sir Richard Couch, Kt., Chief Justice and Mr. Justice Markby.

MADANMAHAN SEN (DEFENDANT) v. CHANDRAKUMAR MOOKER-
JEE AND OTHERS (PLAINTIFFS.)

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Right of Way—Ownership of Soil—Injunction.

G, the owner of certain property, sold it in lots to different persons. The plaintiffs purchased a portion of the property, and obtained from G a conveyance, in which the southern boundary of the land purchased by them was stated to be "the end of the said G, out of which he has allowed a passage six feet broad running almost straight west and east, and terminating on another passage leading, &c.;" the deed continued, "which two passages the said G hath granted and allowed, and doth hereby grant and allow to" the plaintiffs, "their heirs, representatives, and assigns, and all other the purchasers of the northern portion of the said piece of land, &c., together also with the right of the two passages for ingress and egress hereinbefore mentioned." In a second deed, conveying another parcel of land to the plaintiffs, G said, with reference to the latter passage, "no one shall be able to throw sweepings or filth on the said road, or make it unclean; if any one does at any time act thus, you will deal with him according to the laws in force." The defendant had become possessed of part of the northern portion of the land sold by G, and he also owned, under a distinct title, a house abutting on the lane in dispute, but having no doors opening into it. Shortly before the institution of the present suit, the defendant constructed three doors opening on to the lane, two of which were used for the purpose of cleaning two privies on the defendant's premises, and the third was used by the defendant and his servants as a means of access to the lane. In a suit by the plaintiffs seeking damages for trespass and an injunction against the alleged wrongful user of the lane by the defendant, and praying that he might be ordered to close the three doors,—*held* (per COUCH, C. J., and MARKBY, J., overruling the decision of MACPHERSON, J.) that the plaintiffs had not such a property in the soil of the lane as would entitle them to prevent the defendant from making new doors on to the lane, and to restrain him from using the doors already made; they had only a right of way; but an injunction was granted restraining the defendant from using his door-ways for the purpose of cleaning his privies or in any other manner so as to obstruct the free use by the plaintiffs of the lane.

SUIT for damages for trespass to a lane, and for an injunction. The facts of the case were as follows. One Gurucharan Sen, the owner of certain land in Calcutta, divided it into lots and sold it to different persons. The plaintiffs having purchased a portion of the land, Gurucharan Sen, by an English deed dated the 17th March 1868, did "grant, bargain, sell, alien, release, and con-

firm to " the plaintiffs, " their heirs, representatives, and assigns all that piece or parcel of land or ground containing by estimation seven katas, be the same more or less, situate, lying, and being at Balaram Day's Street, Chasadhopaparra, Jorasanko, in the town of Calcutta aforesaid, and butted and bounded in the manner following,—that is to say, on the north by the Government drain, on the east by the land the property of Narayan Patur, on the west by land belonging to the said Gurucharan Sen, and on the south by the land of the said Gurucharan Sen, out of which he has allowed a passage six feet broad running almost straight west and east, and terminating on another passage leading to Balaram Day's Street, and which two passages the said Gurucharan Sen hath granted and allowed, and doth hereby grant and allow, as the passage for the said" plaintiffs, " their heirs, representatives, and assigns, and all other the purchasers of the northern portion of the said piece of land Nos. 68-71 Together with all buildings, erections, walls, yards, benefit and advantage of ancient and other lights, ways, paths, passages, water, watercourses, lands covered with water, pipes, drains, rights and privileges of common of every kind ; together also with the right of the two passages for ingress and egress hereinbefore mentioned." On re-measurement of the land bought by the plaintiffs, there was found to be a small parcel in excess of that originally agreed to be sold, and Gurucharan Sen, on the 27th July 1863, conveyed this parcel to the plaintiffs by a Bengali bill of sale, which, after authorizing the plaintiffs to make a slight deviation in the course of the lane, the subject of dispute, proceeded with reference to it :—" No one shall be able to throw sweepings or filth on the said road or make it unclean ; if any one does at any time act thus, you will deal with him according to the laws in force." The defendant was the owner of a house in Balaram Day's Street, the western wall of which abutted on the lane in dispute, and he had also become possessed of part of the northern portion of the land sold by Gurucharan Sen, and which the latter, by a Bengali bill of sale, dated the 2nd December 1862, had conveyed to one Srimati Kanakmani Dasi, " together with your (the said Srimati Kanakmani Dasi's" pathway to go to and from the said

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land, and three cabits wide from the east to west." There had originally been no doors opening from the defendant's house on to the lane in dispute, but in 1871 the defendant constructed three door-ways leading into it; two of which were used by his servants for the purpose of cleaning two privies in the defendant's house, and the third was used by the defendant and his servants as a means of access to the lane. The plaintiffs had called upon the defendant to close these doors, and upon his refusal they brought the present suit. In their plaint they claimed, by virtue of the conveyance and bill of sale from Gurucharan Sen to them, to be entitled to the soil of the lane subject to such rights of passage, if any, as the other purchasers of the northern portion of Gurucharan Sen's land might have thereon; or, if they were not entitled to the soil of the lane, that they had a right of passage subject to the rights of passage of such other purchasers; but they submitted that the latter, not being parties to the conveyance to them, and not being named therein, were not entitled thereunder to any right of way through the lane. They alleged that the defendant in addition to using his doors as above-mentioned was in the habit of throwing sweepings and filth into the lane; they prayed for damages, and an injunction against the defendant's repeating or continuing the placing of filth and sweepings on the passage, or interfering with the plaintiffs' use of the passage, and that the defendant might be ordered to close up the doors opening from his house into the passage.

The defendant, in his written statement, admitted that he had opened and used the doors in the manner stated, but denied the placing of filth or sweepings in the lane; he set out the bill of sale from Gurucharan Sen to Srimati Kanakinani Dasi; and he claimed, as one of the purchasers of the northern portion of the land sold by Gurucharan Sen, to have a right of way over the lane.

MACPHERSON, J.—Without saying that I consider the plaintiffs' case to be a very meritorious one, I think that they are entitled to my judgment. The question is whether the plaintiffs

have a right to prevent the defendant from using certain doors which he has lately made opening on to a lane, the right of property in which, or, at any rate, the right of exclusive user of which, is claimed by the plaintiffs and certain other persons who own property lying off Balaram Day's Street, behind the front row of houses which actually abut on the street. The plaintiffs' property (on which their dwelling-house stands) was originally part of a larger parcel of land which belonged to one Gurucharan Sen, and which ran up to and abutted upon the defendants's premises. Gurucharan Sen divided his land into lots and sold it to different purchasers, and he reserved a portion of the land six feet wide, along the western side of the defendant's premises, to be used as a lane by which the plaintiffs and the other purchasers of the inner lots should have the means of access to and from Balaram Day's Street. The defendant seems, like the plaintiffs, to have a right of way over this lane, he being the purchaser of one of the lots which belonged to Gurucharan Sen, and which is marked in the map before me as C; but the defendant's premises, which are the subject of this suit, do not abut upon this lot C, and are held under a totally distinct title (not through Gurucharan Sen at all). It is to be remarked that the defendant, in the conveyance (of the land C) which he got from Gurucharan Sen, has, so far as I can see, no express right of way or otherwise over this lane reserved to him, for the only lane which is mentioned in the deed is the smaller lane in the immediate vicinity of the lot C, and leading into the larger lane, the subject of this present suit. The plaintiffs, on the other hand, have this lane expressly reserved to them and the other purchasers.

The plaintiffs got two deeds of conveyance from Gurucharan Sen. The first, of March 17th, 1863, is an English deed, and after describing the lane, says:—"Which two passages the said Gurucharan Sen hath granted and allowed, and doth hereby grant and allow, as the passage for the said Chandra Kumar Mookerjee, his heirs, representatives, and assigns, and all the other purchasers of the northern portion of the said pieces of land." The second, of the 27th July, 1863, is a Bengali bill of sale of a very small parcel of land, and, referring to this lane,

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it continues to the following effect:—"No one shall be able to throw sweepings and filth on the said road or make it unclean. If any one does at any time act thus, you will deal with him according to law."

Until last year the lane had no doors opening upon it from the defendant's premises, but recently the defendant has made three new doors which open on to the lane. Two of them are used for the purpose of cleaning two privies which the defendant has on his premises, and the third is a door used by the defendant and his servants as a means of access to the lane. The plaintiffs complain of these doors as a nuisance, and as an infringement of their rights. They say, and I have no doubt truly, that the having the privies cleaned in this manner is a great annoyance to themselves and the other occupants of the inner lots who have the right to use the lane; and they declare that the lane, at the time when the privies are being cleaned, becomes almost impassible. It seems to me that the plaintiffs have sufficient property in the soil of the lane to entitle them to insist on the lane being kept in the same state as hitherto, and that they have a right to prevent the defendant from making new doors on to the lane, and to restrain him from using those doors which have been made. The lane is not a public lane, and I do not think that, even if he has the same right to use the lane that the plaintiffs have, the defendant has thereby acquired any right which enables him to clean his privies by means of these new doors, or to open new doors by which he and his servants may have access to the lane.

I do not think that the plaintiffs are entitled to an injunction restraining the defendant from throwing filth or from permitting water to flow into the lane. No sufficient case of throwing filth has been made out, and the acts spoken to are but of small importance; water apparently did flow from the privy on to the lane, but that has now altogether ceased. I think, however, the plaintiffs have a right to complain of the cleansing of the privies as a substantial nuisance.

An injunction will issue restraining the defendant's servants from using any of the three doors or openings complained of. I do not think the plaintiffs have proved any substantial pecu-

niary damage, and therefore, I shall give them Rs. 25, by way
of nominal damages with the costs of this suit on scale No. 2,

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Mr. Kennedy and Mr. Lowe for the appellant.

The Advocate-General (*offg.*) and Mr. Brunson for the respondents.

Mr. Kennedy.—The question is whether the plaintiffs have such a property in the soil of the lane, or such an easement over the lane, that they can prevent the defendant from using it. The language used in the grant clearly shows that the vendor did not convey the soil of the lane, but only gave a right of way. The plaintiffs, therefore, cannot object to the lane being used by others, provided such user does not interfere with their right—*Hill v. Tupper* (1), which was a stronger case than the present, for there the plaintiff had, so far as the law permitted, a sole and exclusive right. The plaintiffs claim an exclusive easement, which is contrary to law. [COUCH, C. J.—The learned Judge seems to have thought that there had been an interference with the enjoyment of their right.] He could not have thought so, otherwise he would have given substantial damages. If the words in the deed of 17th March 1863 pass the property in the soil of the lane, they pass the property to all the purchasers of the northern portion of the premises sold, and therefore to the defendant. The learned Judge has granted a perpetual injunction to restrain the defendant from using the doors in any way; but, if use of the lane creates no obstruction, the injunction is not maintainable. The grantor has entered into no covenant with the respondent not to dedicate the lane to the public, and he may do so at any time; but even if he does not, the public may acquire a right by user—*Bateman v. Bluck* (2).

Mr. Lowe on the same side.—The defendant has a right to be in the lane in respect of his premises in the northern portion of the land sold; then, can the plaintiffs dispute his right to use the doors opening into the lane? In other words, can they either maintain trespass against the defendant for using the lane,

(1) 2 H. & C., 121.

(2) 18 Q. B., 870.

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or can they block up the doors? [Couch, C. J.—They cannot block up the doors, but they may place an obstruction on their own land to prevent your entering on it.] That would be in order to prevent the defendant from acquiring a right of way over the plaintiff's land but the defendant already has a right of way over this lane. Suppose that the defendant, instead of having this house, had a piece of open land on the side of the lane, could the plaintiffs contend that, although he has a right to be on his land and a right to be in the lane, he could not step over the boundary line notwithstanding the fact that no separating fence had been placed in the lane by the owner of the soil?

The *Advocate-General* (*offg.*) for the respondents.—The decision in *Hill v. Tupper* (1) was put on the ground that the grant purported to create a novel kind of easement. If the soil, of the lane belongs to the plaintiffs they are entitled to an injunction *in toto*; and it is submitted that, on a true construction of the two conveyances to the plaintiffs, the property in the soil, and not merely a right of way, was granted; but if they have only a right of way, and the defendant has a right of way, I submit that the latter can only use his right for the purpose for which it was granted,—namely, as appurtenant to his premises on the northern portion of the land sold, and not as appurtenant to this house.

Cur. adv. vult.

The judgment of the Court was delivered by

COUCH, C. J., (His Lordship, after a brief analysis of the plaint, continued):—The question between the parties really depends upon the construction of the deed of the 17th of March 1863, whether by that deed the plaintiffs acquired the soil in the passage in question, or whether they only acquired a right of way over it? If they have a right to the soil, they can prevent the defendant from making any use whatever of the passage. It might be that the defendant could open doors in his wall running along the side of the passage provided he did not encroach upon the passage; still the doors would be of no use to him, because he

would not be allowed to pass through them into the passage. On the other hand, if the deed granted only a right of way, the plaintiffs could only complain of the defendant's doing acts which obstructed them in the enjoyment of it, and the injunction which the plaintiffs have claimed to restrain him from having egress or ingress through the doors, and to close them up, cannot be granted. The terms of the deed are these (his Lordship read the portion of the deed above set out, and continued). We think that the ordinary meaning of such words as these in a conveyance of this description is that the parties intended to give only a right of way, and not to pass the property in the soil. Even if there were not persons besides the plaintiffs who appear to be intended to have the use of the passage as purchasers of other portions of the property, we think that the words would only have given a right of way. It makes it stronger against the plaintiffs' claim to a right in the soil that other persons were evidently intended to have the use of the passage. Nor do the words which follow, "together also with the right of the two passages for ingress and egress hereinbefore mentioned," make any difference; they would only give a right of way, and this is sufficient for the plaintiffs' enjoyment of their property.

Then it was argued that the subsequent deed, the bill of sale, might assist the plaintiffs' case and show that it was intended that the plaintiffs should have a right to the soil. We think it does not do that. Provision is made for some alteration in the passage in order to allow the purchasers to erect other buildings, and the words relied on are, "no one shall be able to throw sweepings or filth on the said road or make it unclean; if any one does at any time not thus, you will deal with him according to the laws in force." That could be prevented as well by having a right of way as by having a right to the soil. The plaintiffs would be able, according to the laws in force, to prevent persons from depositing sweepings and filth in the passage. We think, therefore, that the right which the plaintiffs acquired was only a right of way; that they were entitled to complain of any acts of the defendant which obstructed them in the enjoyment of that right of way; and were entitled to an

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injunction against future obstructions. A considerable portion of the plaintiffs' case as to the obstruction has failed, but it did seem that the use of the doors to clean privies was a serious obstruction to the use of the right of way. The plaintiffs have a right to use the passage at all times, and it certainly did appear that there were times when the presence of the men who were engaged in cleaning the privies practically prevented the use of the passage. We think, therefore, that, in order to prevent as far as possible future disputes between the parties as to the cleaning of the privies, that portion of the decree of the learned Judge should stand. The decree grants an injunction "to restrain the defendant, his servants, and agents from using all or any of the three door-ways or openings made by the defendant through the western wall of the defendant's dwelling-house, No. 114, Balaram Day's Street, as a means of cleaning and emptying the privies situated in the said house, No. 114, in Balaram Day's Street aforesaid, or either of them." We think that the injunction should go to that extent, and there should be added the words "or in any other manner so as to cause any obstruction to the free use by the plaintiffs of the said passage." The other part of the decree is "or as a means of egress and ingress from and to the said house, No. 114, in Balaram Day's Street aforesaid, to and from the passage running north from Balaram Day's Street along and past the western wall of the said house, No. 114, in Balaram Day's Street." That part cannot remain. The plaintiff, have not shown a title which could support that, and it must be omitted. The decree will be modified in that respect. The plaintiffs failed before the learned Judge as to a very material portion of their suit, and they have also failed in this appeal. The appellant has shown good grounds for appealing, and has succeeded in having the decree modified. He will, therefore, have his costs of the appeal on Scale No. 2.

Decree modified.

Attorneys for the appellant : Messrs. Trotman, Chatterjee, and Watkins.

Attorney for the respondents : Mr. Owen.

[APPELLATE CRIMINAL.]

Before Mr. Justice Kemp and Mr. Justice Glover

IN THE MATTER OF THE PETITION OF H. P. CASPERSZ.

Criminal Procedure Code (Act XXV of 1861), s. 435—Powers of a Court of Session—Remand—Meaning of words “without enquiry.” 1872
March 28.

Where an accused person has been discharged by a Magistrate under s. 250 of the Criminal Procedure Code, after enquiry into the case, the Court of Session cannot, under s. 435, remand the case for further enquiry.

On the complaint of the Raneegunge Coal Association, one H. Casperaz was charged with criminal misappropriation of certain moneys belonging to that Association. The case was heard by the Deputy Magistrate of Raneegunge, who was vested with the full powers of a Magistrate. The Deputy Magistrate, after going into the whole of the evidence for the prosecution, came to the conclusion that no charge of misappropriation had been made out against the accused, and he dismissed the case. The Sessions Judge of Burdwan, acting under the provisions of s. 435 of the Code of Criminal Procedure, ordered the Deputy Magistrate to make further enquiry into the complaint. After the order of the Sessions Judge was passed, but before the day fixed by the Deputy Magistrate of Raneegunge for making the further enquiry ordered by the Sessions Judge, Dr. Mendes, for the accused, moved the High Court, under s. 404, to send for the record, and quash the order of the Sessions Judge, on the ground that the complaint was not dismissed “without enquiry” within the meaning of s. 435, since the accused was discharged under s. 250 after evidence had been given by the prosecution. He also urged that the order of the Deputy Magistrate discharging the accused was tantamount to an acquittal.

* Miscellaneous Criminal Case, No. 63 of 1872, against an order of the Sessions Judge of East Burdwan, dated the 3rd February 1872.

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As Dr. Mendes produced authenticated copies of all the proceedings of the Courts below, the High Court, without sending for the record of the case, passed the following judgments:—

KEMP, J. (after briefly stating the facts).—The Judge did not think proper to order the commitment of the accused. There can be no doubt that, in this case, as the accused was not put on his defence, the order dismissing the case amounts only to a discharge of the accused, and that the Judge was competent under s. 435, if he thought proper, to order the commitment of the accused. Not having done so, and having acted under the alternative portion of s. 425, the Judge was bound to keep strictly within the terms of that section. Now the terms of that section, in as far as the alternative portion of it are concerned, are that, in the case of such offences,—that is to say, offences triable by the Court of Session, or by the Magistrate of the district, or by any officer exercising the full powers of a Magistrate,—the Court of Session may order an enquiry to be made into any case which the Magistrate or other officer exercising the powers of a Magistrate may have dismissed without enquiry. Now, in this case, can it be said that the complaint has been dismissed without enquiry? We think that the contention of the learned counsel in this case is correct. There can be no doubt that, not only has there been an enquiry in this case, but that there has been a most elaborate enquiry. Witnesses for the Coal Association have been examined, their account-books have been produced, and the whole case has, in our opinion, been thoroughly enquired into, and *prima facie* the decision of the Deputy Magistrate appears to us, as far as we can judge of it from the evidence which he alludes to, a proper decision; but be that as it may, he has dismissed the case as against the accused after taking evidence and after due enquiry. We have not found any authority contrary to the learned Counsel's contention with the exception of a Criminal Letter (1). In that case the Sessions Judge appears to have doubted whether he could proceed under the latter portion of s. 435 in a case where some-

(1) 3 W. R., Cr. Let., 21.

enquiry had been made, and the letter referred to informed him that he was in error in supposing that he could not proceed under that section, because the words "without enquiry" mean without proper enquiry. We are not bound by this Criminal Letter; and, following the words of the law, we must hold that there has been an enquiry in this case; and it can hardly be said that the enquiry has not been a proper one. We, therefore, think that the order of the Judge ordering a further enquiry must be set aside.

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GLOVER, J.—I wish to add one word (whilst entirely concurring in the order to be passed), to guard myself against giving any opinion as to the sufficiency or otherwise of the enquiry made by the Deputy Magistrate. We have had the evidence before us, and the Judge, on the other hand, says that he considers the enquiry not to have been a proper or sufficient one. I wish to avoid pledging myself to any opinion as to the sufficiency of the enquiry. It is enough for the purposes of this case that there was an enquiry.

Order quashed.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

IN THE MATTER OF THE PETITION OF JIAT SAHU.*

1872
August 17.

Criminal Procedure Code (Act XXV of 1861), ss. 250 and 435—Re-trial by a Magistrate—Powers of a Court of Session—Remand.

Where a Magistrate had discharged an accused under s. 250 of the Criminal Procedure Code, and afterwards the Sessions Judge having remanded the case for further enquiry re-tried it and convicted the accused, the High Court, while holding that the Sessions Judge had no power to make the order of remand, upheld the conviction.

One Jiat Sahu had been charged (under s. 405 of the Penal Code) before the joint Magistrate of Saran with having committed criminal breach of trust with respect to a certain sum of money which had been placed in his custody by the com-

* Miscellaneous Criminal Case, No. 158 of 1872, against an order of the Officiating Joint Magistrate of Saran, dated the 8th October 1871.

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plainant, who had taken shelter for the night in his shop. The Joint Magistrate, after examining four witnesses for the prosecution, including the complainant, discharged the accused under s. 250 of the Criminal Procedure Code, holding that the evidence had not made out a *prima facie* case. On the motion of the complainant, the Sessions Judge, acting under s. 435 of the Criminal Procedure Code, remanded the case to the Joint Magistrate to make a more searching enquiry. The Joint Magistrate, in pursuance of the orders of the Judge, took further evidence for the prosecution, drew up a charge, took evidence for the defence, and eventually convicted the accused. The Sessions Judge, on appeal, upheld the conviction.

The High Court (Kemp and Glover, JJ.), on the application of the accused, sent for the record of the case under s. 404 of the Criminal procedure Code.

Mr. Sandel for the accused.—S. 435 of the Criminal Procedure Code contemplates only two classes of cases in which the Sessions Court can interfere,—*viz.*, cases triable exclusively by the Court of Session, or by the Magistrate of the district, and not cases in which other Subordinate Courts have concurrent jurisdiction with the two superior Courts. But a Subordinate Magistrate of the first class has power to try such a case as this, and, therefore, it does not come within the provisions of s. 435. If it be assumed that the present case is governed by s. 435, still the Court of Session had no authority in this case to remand it to the lower Court for further investigation, because the lower Court had discharged the accused after taking evidence for the prosecution, and it cannot therefore be said that the complaint was dismissed “without enquiry.” In the case of *In the matter of the petition of H. P. Caspersz* (1), the words “without enquiry,” in s. 435, were held to mean where no evidence whatever for the prosecution had been taken by the Magistrate before discharging an accused person; the order of the Sessions Judge under s. 435 being, therefore, erroneous, the subsequent proceedings of the Joint Magistrate in pursuance of it

(1) *Ante* p. 337.

are void. [AINSLIE, J.—The Magistrate has power, independently of the order of the Sessions Judge to revive the prosecution against an accused person discharged under s. 250.] No doubt, the Joint Magistrate has such power, but in the present case it is quite certain he acted in pursuance of the order of the Judge remanding the case. It is impossible to say that the Joint Magistrate would, of his own accord, have revived the prosecution in this case. It is discretionary with a Magistrate to revive a prosecution against an accused who has been discharged under s. 250, and it cannot be said that, when a Court acts in obedience to the orders of a superior Court, it exercises its discretionary powers.

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Baboo Taraknath Sen for the complainant was not called upon.

COUCH, C. J.—In this case, as the offence was one triable by a Subordinate Magistrate of the first class, the Sessions Judge had not power to make the order which he made, and the case coming up to us under s. 404, we decide that the order was an erroneous one, and ought to be set aside; but it does not follow from this that the subsequent proceedings before the Magistrate ought to be set aside. If the order of the Sessions Judge was essential to the action of the Magistrate in again taking up the case, and trying the accused, of course, the order being set aside, the other proceedings would also be set aside. But the Magistrate, after he had discharged the accused under s. 250, had power, if circumstances appeared to him to require it, to take up the case again, and to re-try the accused. He appears to have had before him on the second occasion some fresh evidence upon which he drew up a charge, and having heard the defence of the accused, convicted him, which he had power to do. In whatever way the Magistrate was set in motion on the second occasion, there has been a proper conviction of the accused. The Magistrate might, and indeed ought to, have taken up the case again, and to have tried it as he has done. Therefore, I do not think that the circumstance that he was led to enter upon the second enquiry and second trial by the Sessions Judge having

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made his order, is a ground for setting aside his proceedings and the conviction. If that were now to be done, it would be the duty of the Magistrate, upon the facts with which he is now acquainted, to take up the case and investigate it. It would not be proper that a person, who appears upon the evidence taken to have committed an offence, should go entirely free and unpunished, because the Sessions Judge has made this order erroneously.

A decision of Kemp and Glover, JJ., dated the 28th of March 1872, in the case of *In the matter of the petition of H. P. Caspersz* (1) has been read to us, but that decision is not in conflict with what we now decide. It set aside the order of the Sessions Judge; but nothing was said as to what the consequences of setting it aside would be, that question really not arising in the case.

Appeal dismissed.

Before Mr. Justice Kemp and Mr. Justice Glover.

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July 26.

IN THE MATTER OF THE PETITION OF THE GOVERNMENT OF BENGAL.*

Review of order in Criminal Case—Fraud—Forfeited Property—Criminal Procedure Code (Act XXV of 1861), ss. 184, 185—Penal Code (Act XLV of 1860), s. 174.

Where property of an absconding offender had been attached and declared to be at the disposal of Government under s. 184 of the Criminal Procedure Code, and the offender was subsequently convicted under s. 174 of the Penal Code, and such conviction was upheld on appeal, *held*, the High Court had no power to make any order with respect to such property.

Where an order for the release of the property so attached had been obtained from the High Court on an *ex-parte* application, and on an incorrect statement of facts, the High Court, on the application of the Government, cancelled such order.

This was a petition to the High Court (Kemp and E. Jackson JJ.), on behalf of one Mir Sarwar Jan, who had been convicted of riot and murder by the Sessions Judge of Dacca, but had been acquitted on appeal to the High Court. The present application had reference to the proceedings of the Magistrate against the petitioner under the provisions of s. 174

* Miscellaneous Criminal Case, No. 134 of 1872.

(1) *Ante*, p. 337.

of the Penal Code. The Magistrate found that the petitioner intentionally omitted to attend his Court in person in obedience to a proclamation which had been duly served on the premises of the petitioner; and having intentionally omitted to attend in person before the Magistrate to answer the charge of riot and murder. The Magistrate sentenced the petitioner to the maximum punishment allowed for the offence,—namely, six months' imprisonment and a fine of Rs. 1,000.

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The judgment of the Court was delivered by

KEMP, J. (who, after stating the facts as above continued).—

There are three grounds taken by the pleader for the petitioner, Baboo Durga Mohan Das. First, that as the offence of which the petitioner has been convicted was an offence committed before the Magistrate, who has convicted the petitioner under s. 174 of the Criminal Procedure Code, the Magistrate ought to have sent the petitioner to be tried by some other Court. The pleader called our attention to several rulings of this Court, one of which applies to the case before us,—namely, the case of *Queen v. Chandra Sekhar Roy* (1). The second ground taken is that there is no evidence that the petitioner intentionally omitted to attend the Magistrate's Court. We have read the evidence of several witnesses who depose to the due service of the proclamation, and to the fact that the petitioner and all his family had left the family dwelling-house, and reading that evidence, and looking to the surrounding circumstances of the case, we think that it cannot be said that the petitioner's absence did not originate in a desire to evade the process. We think it clear that he was intentionally evading process. The last ground taken is that the sentence, taking the whole of the circumstances into consideration, is excessive. We find that the petitioner was sentenced on the 26th July 1871, and that he remained in jail up to the 1st December 1871, when he was enlarged on bail according to the orders of this Court. Looking, therefore, to the time that he was in jail, and to the fact that he was

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acquitted of the original charge of riot and murder, we direct that he be released, setting aside the remaining portion of the sentence not yet expired.

On the 27th March 1872, Sarwar Jan, by his pleader, again applied to the High Court (Kemp and Glover, JJ.) for the restoration of his property which had been confiscated by the Magistrate. He stated in his petition that the Magistrate of Furreedpore had, before sentencing him under s. 174 of the Penal Code, confiscated all his moveable property under s. 184 of the Criminal Procedure Code; that, after the High Court had remitted the remainder of the sentence passed by the Magistrate, the accused applied to the Magistrate, under s. 185 of the Code of Criminal Procedure, praying to be restored to the possession of his confiscated property, as the same had been released by the High Court; but the Magistrate, being of opinion that the High Court had passed no specific orders regarding it, rejected the application; that the accused next appealed to the Judge of Dacca who directed the application to be made to the Additional Judge of Furreedpore, and that the latter officer, on being applied to, refused to interfere on the ground of want of authority, though he was of opinion that the High Court's order included the release of any property attached by the Magistrate. The petitioner prayed that, as the High Court had already released him "from the unjust sentence passed by the Magistrate," the Court would be further pleased to order the property confiscated to be released.

On the same day the Court passed an order directing the Magistrate to "restore all the moveable property of the petitioner which may be under attachment."

Mr. Bell, the Legal Remembrancer, subsequently applied on behalf of the Government to the Court (Kemp and Glover, JJ.), objecting to the order of the 27th March. His prayer was thus worded :—

"Your Lordships, without calling upon the Government to show cause against the said Mir. Sarwar Jan's application, directed the Magistrate to restore to the petitioner all the moveable property which was

under attachment; that your petitioner submits that your Lordships' order did not refer to the property of the said Sarwar Jan which had been declared to be at the disposal of Government, but only to such portion of the said Mir Sarwar Jan's property as was under attachment; but should your petitioner be in error in supposing that your Lordships' order did not embrace the property which had been declared to be at the disposal of Government, your petitioner would solicit your Lordships to cancel your *ex parte* order of the 27th March, and allow your petitioner to be heard in the case."

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The Court (Kemp and Glover, JJ.) ordered a notice to be served on Mir Sarwar Jan to show cause why the order of the 27th March 1872 should not be cancelled.

Mr. Bell for the Government.—The Court have not acquitted the accused of the offence under s. 174 of the Penal Code, of which he was convicted, but have merely remitted the fine and the remainder of the term of imprisonment, holding that the conviction was proper. The property referred to by the accused in his petition of the 27th March, and in the order of this Court of the same date, was not property which had been attached for the realization of the fine, but property which had been attached under s. 184 of the Criminal Procedure Code previous to the passing of the sentence, at the time when the proclamation was issued, calling upon him to appear and answer to a charge of riot and murder; it had also before the conviction of the accused been declared to be at the disposal of Government. The property can only be restored in the way indicated in s. 185 of the Code; but the conviction under s. 174 of the Penal Code having been upheld by this Court, the accused cannot avail himself of the provisions of s. 185. The property is at the disposal of Government, and this Court has no control over it. The order of the 27th March was passed, it would seem, in ignorance of the real facts of the case, and is one which clearly this Court had no jurisdiction to make.

Baboo Durya Mohan Das for the accused.—There is no section of the Act under which the Government can ask for

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a review of the order of the 27th March. *Queen v. Godai Rout* (1) decides that there can be no review of an order of this Court in a criminal case. If the order be really without jurisdiction, it is void *ab initio*, and the Magistrate need not obey it.

Mr. Bell in reply.

The judgment of the Court was delivered by

KEMP, J.—In this case Mr. Bell, the Legal Remembrancer, appeared on behalf of the Government of Bengal, and moved the Court to cancel an order passed on the 27th March 1872, on the *ex parte* petition of one Sarwar Jan.

On the 8th July 1872, notice was issued to Sarwar Jan to appear in person or by pleader.

It appears that Sarwar Jan was committed by the Magistrate of Furreedpore to the Sessions to take his trial on a charge of riot with murder. Sarwar Jan was convicted by the Sessions Judge, but, on appeal, was acquitted by this Court.

Previous to the apprehension and commitment of Sarwar Jan, he had evaded process,—*viz.*, a warrant,—issued against him, and certain moveable property belonging to him, which had been attached, was declared to be at the disposal of the Government under s. 184 of the Code of Criminal Procedure. After the acquittal of Sarwar Jan by this Court, he was put on his trial under s. 174 of the Penal Code, and being convicted, was sentenced to imprisonment for a term of six months and a fine of Rs. 1,000, this being the maximum sentence which can be passed under that section.

Sarwar Jan then petitioned this Court, and, on the 22nd December 1871, Kemp and E. Jackson, JJ., were of opinion "that it could not be said that Sarwar Jan's absence did not originate in a desire to evade process;" but on the last ground of his petition, which contained a prayer for mitigation of punishment, those Judges held that, although they confirmed the conviction, they were of opinion that, as Sarwar Jan had been then some months in jail, and had been acquitted of the graver charge of riot with murder, the remaining portion of the

sentence ought to be remitted. Nothing was said as to the remission of the fine, but, doubtless, it was the intention of the Judges to remit it.

Subsequently, on the 27th March 1872, Sarwar Jan presented a petition to this Court, praying that as he had been, as he states, "released by this Court from the unjust sentence passed by the Magistrate," the Court would be pleased to direct the confiscated moveable property to be restored to him. On this petition we passed an order directing the Magistrate to restore all the moveable property of the petitioner which may be under attachment.

It is clear that the pleader who presented this petition did not place the true circumstances of the case before the Court; no mention of the fact that the property in question had been declared to be at the disposal of the Government was made (1), the petitioner was also incorrect in stating that this Court had "released him from the unjust sentence passed by the Magistrate." What the Court did, was to mitigate the sentence, although they upheld the conviction.

It has been argued by the pleader for Sarwar Jan that this Court is not competent to review its order, and the case of *Queen v. Godai Rout* (2) was referred to. In that case it is laid down that a review of judgment will not lie from a sentence or judgment pronounced by the High Court, or by a Division Bench of the High Court, on appeal. But in this case our order was passed without notice to the Magistrate or the Government of Bengal, and the facts of the case were, to say the least, not correctly stated.

Being, therefore, of opinion that the property which has been declared to be at the disposal of the Government, of Bengal can only be restored to Sarwar Jan by that Government, and that our order of the 27th March 1872, which, though it refers in terms to the property under attachment, clearly contemplated the property in question, was based upon an error in law caused by a misrepresentation of facts, we cancel it.

Order cancelled.

(1) See statement contained in petition, *ante* p. 344.

(2) B. L. R., Sup. Vol.

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[PRIVY COUNCIL.]

P. C.*
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SYAD LUTF ALI KHAN (PLAINTIFF) v. MUSSAMAT :
AFZALUNISSA BEGUM AND OTHERS (DEFENDANTS).

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

Limitation—Act XIV of 1859—Agreement—Money had and received.

A, B, and C being joint creditors of D, A and B received, in 1866, a payment on account in respect of their share in the debt. D having made default in payment of the balance, separate suits were brought against him by A, B, and C. The Court having held that the payment was a payment to all, A and B recovered more than, their share, and C recovered less. A family suit for partition between A, B, and C was in 1862, compromised, and it was agreed that all claims between the parties should be considered as settled, but it was agreed that if C should, out of an appeal brought by him against D, have any claim against A and B, that should be reserved. C's appeal was, in 1863, unsuccessful, and in 1864 he brought an action against A and B for his share of the money paid in 1866. Held, that he was entitled to recover the amount which A and B had recovered against D in excess of their claim, and that the suit was not barred by the law of limitation.

THIS was an appeal from the decree of the High Court of Calcutta, dated the 30th June 1865, reversing the decision of the Judge of Patna on the ground that the suit was barred by the law of limitations.

The appellant and respondents were members of the same family, being heirs of Syad Abdulla. The appellant was entitled to ten twenty-fourths, the respondents to fourteen twenty-fourths. Syad Abdulla was a creditor of the Raja of Durbungah, who on an account stated with the heirs, was found in debt Rs. 3,34,812-14, for which sum, with interest, he executed a bond to the heirs, dated 21st July 1849. In December 1856, the respondents received from the Raja two lakhs, and for that sum receipts were given by the respondents as entitled to fourteen twenty-fourths of the debt. In 1861, the appellant and the

* *Present*:—THE RIGHT HON'BLE SIR JAMES COLVILLE, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, AND SIR LAWRENCE PHEL.

respondents brought separate actions against the Durbungah manager, there being four actions in all. The appellant in his suit treated the two lakhs as paid on account of the fourteen twenty-fourths, and claimed for himself ten twenty-fourths of the principal, which, with interest, amounted to Rs. 2,79,010-11-8. In each of the other suits, the amount claimed was calculated thus :—

	Rs.	A.
Amount of bond	3,34,812	14
Interest to date of payment of two lakhs ...	2,98,541	2
	Rs. 6,33,354	0
Deduct 10-24ths	2,63,897	8
	Rs. 3,69,456	8
Deduct paid on account... ..	2,00,000	0
Balance of principal	Rs. 1,69,456	8

Which sum, with interest on that balance, the respondents claimed as their fourteen twenty-fourths.

The four suits were heard together. The Durbungah manager contended that the two lakhs must be deducted from the whole debt, and not from any particular share thereof. The Judge took the same view, in consequence of which the appellant recovered Rs. 25,530 less than the amount claimed by him, and the other sharers recovered Rs. 16,155 more than they claimed. The present appellant preferred an appeal to the High Court against the decision in his case.

While that litigation was proceeding, suits were pending between the appellant and the respondents as to a partition of their estates ; and before the appeal by the appellant in his suit against the Durbungah manager was heard, a compromise of their family disputes was made by the appellant and respondents, which was carried out by deeds dated in November 1862, one of the clauses being that all claims between the parties should be considered as settled. This clause was, however, followed by

"Clause 11.—That, with regard to the claims involved in the appeal pending before this Court in No. 456 of 1861, and arising out of a suit

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brought by Syad Lutf Ali Khan against the Raja of Durbungah, it is hereby stipulated that this settlement and compromise have and shall have no connection therewith; that, if in future there arise in any way any kind of dispute in connection with the claim involved in the above case between your petitioners (the respondents) and Syad Lutf Ali Khan, this compromise shall not bar such claims."

On the 14th December 1863, the High Court affirmed the decision of the Court below.

On the 6th August 1864, the appellant brought the present suit against the respondents to recover his ten twenty-fourths of the two lakhs paid to them in December 1856, with interest from that date. The respondents contended that the suit was barred by limitation, and that, by the deeds of compromise, all matters in difference were settled, and he could not claim a share of the two lakhs.

The Judge considered that the clause reversing the rights of the appellant, in the event of his appeal being adverse to him, entitled him to sue for the actual amount he had been prevented recovering from the Durbungah estates,—that is, Rs. 25,590, and that the time of action accrued from the date of the decision of the appeal.

The High Court (Seton-Karr and Campbell, JJ.) held that the suit being for the share of the two lakhs, the claim was barred by the law of limitation.

Sir *Rowdell Palmer*, Q. C., and *Mr. Pontifax*, for the appellant, contended that the deed of compromise having expressly reserved the appellant's rights in the event of his appeal being unsuccessful, the time could not begin to run until the decision of that appeal; and that, although the claim was stated as being for a share of the two lakhs, the clause in the compromise entitled the appellant to claim all the benefit which the respondents had received from that money having been received by them.

Mr. Field, Q. C., and *Mr. Doyne*, for the respondents, contended that the compromise was a settlement of all claims up to that date; that although the payment of the two lakhs was

known to have been made to the respondents, no mention of that was made, and the mere fact of an erroneous decree by the High Court, under which the appellant did not recover all he was entitled to, gave him no claim against them. The appellant should have proceeded to set aside that decree if it was erroneous. But if the suit was not barred by limitation, the appellant could not recover what he had lost, but if anything, only what the respondent had been paid in excess, viz., Rs. 16,155. The receipt of the two lakhs was not an improper receipt by the respondents. The frame of the suit, however, would not entitle the appellant to recover even the Rs. 16,155; his claim was not for that sum, but for the share of the two lakhs.

Their LORDSHIPS gave the following judgment :—

In this case their Lordships are of opinion that the decree of the High Court ought to be reversed, and the decree of the Zilla Judge maintained, with a variation which their Lordships will state.

The circumstances of the case are these :—There was a very large bond-debt, and apparently, as far as the evidence in this suit goes, that debt was a debt payable to the shareholders, the heirs of a deceased banker, according to their shares in the estate. Out of that debt a sum of Rs. 2,00,000 was paid, and apparently was paid in respect of some of the shares of the defendants, and not in respect of the share of the plaintiff, the present appellant. The sum of Rs. 2,00,000 having been thus paid, different shareholders were minded to bring separate actions against the debtor for their shares respectively of the balance, in each action assuming that the Rs. 2,00,000 had been paid in respect of the share. But the debtor contended that he was entitled to have the Rs. 2,00,000 appropriated in part reduction of the whole debt. The result in all those actions was that the Court decided that the Rs. 2,00,000 must (against the debtor) be appropriated to the whole debt, and in consequence of their holding that it must be so appropriated, they cut down the claim of the appellant very considerably, and they enlarged the claims of the respondents, and gave them a very considerable benefit,—the result being that from that mode of dealing with the payment of the Rs. 2,00,000, the plaintiff lost Rs. 25,000.

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of his share, and the defendants got, as they have admitted through all the proceedings, Rs. 16,000 more than they were entitled to from the common debtor.

That being so, the appellant filed his plaint, saying, in effect, "you received the Rs. 2,00,000 and it has been now decided that that Rs. 2,00,000 must be considered as being received an account of all of us, and must be so considered from the time when the Courts so decided, and you must account to me for my full share of that sum." In this case the Judge of the Zilla Court did not take that view, but took it as a debt arising out of the result of the suits, and he came to the conclusion that the Rs. 25,000, which the plaintiff had lost as the result of the proceedings based upon the new view taken of the original payment, was the sum which the plaintiff was entitled to recover from his co-obligees. The defence of the statute of limitations was pleaded, and was overruled by the Zilla Judge; that defence of the statute of limitations was, however, sustained by the High Court; that defence would certainly not be applicable if the claim were based on, or arose out of, the result of the suits, and not out of the original payment. Their Lordships are of opinion that it did arise out of the result of the suits, and not out of the original payment which, as far as the appellant and respondents are concerned, was clearly a payment made upon the footing that it was to be taken out of the share of the respondents; and it was not till the respondents had got more than their share that they could be said to have received any money to the use of the appellant so as to give any ground of action.

But the case does not stand merely upon that. There was a document which appears originally to have been very much relied upon by the defendants themselves—the respondents—as a document excluding this claim. They said "there was a deed of compromise made, by which the claim of the appellant to any share of anything which we have actually received is barred." On the other hand, the appellant's contention, with reference to that deed, was that there was a particular clause in that deed (the 11th clause of one deed, and the 10th of another similar deed), the effect of which he says is this:—

"There is an appeal pending between me and the debtor, in which I am trying to get back what I can upon the footing that the decision of the Court is wrong about the two lakhs of rupees ; that being so, the compromise is not to effect that in any way whatever, and if any claim should arise out of the result of that appeal, any question upon that is reserved as between us." The Zilla Court was of opinion that that was the true effect and construction of the deed, and in that opinion their Lordships concur. From that time, it appears to their Lordships, there could be no question as to the Statute of Limitations, as the thing was, by contract between the parties, reserved and kept open until the decision of that suit was arrived at, and very reasonably so, because, if the plaintiff had succeeded in that suit in getting the money from the debtor, of course he would have had no manner of claim whatever against the respondents, who were desirous that he should proceed with that claim, and should recover as much as possible from the other party, and not from them. Their Lordships are of opinion that the decision of the High Court that there was a bar under the Statute of Limitations was erroneous.

But the Judge of the Zilla Court arrived at the conclusion that the plaintiff was entitled to recover the Rs. 25,000, that is to say, the sum which he lost. Their Lordships are of opinion that that is not the true measure of the liability of the respondents ; that they were not obliged to indemnify him from the loss which arose from the mode in which the suits against the debtor were dealt with ; but that, as they had received the Rs. 2,00,000, and afterwards, by the result of the proceedings, they had received in respect of that same debt Rs. 16,000 more than they admitted themselves to be the full amount of their claim, and as part of the same mode of dealing with them, the Rs. 25,000 loss had been incurred by the plaintiff, their Lordships are of opinion that, upon every principle of equity, the Rs. 16,000 surplus so received was money had and received to the plaintiff's use, and that his claim to that amount was one of the things which he was entitled to make under the deed of compromise. Their Lordships are of opinion that there is nothing in the contention that this claim was not specifically

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made by the plaint in this suit. The plaint clearly states the circumstances under which the claim of the plaintiff arises. He cannot sustain his suit for the whole amount claimed, but there is nothing in his claim for the larger amount which deprives him of his right to recover the smaller amount, which, as the result of the facts pleaded and proved, their Lordships are of opinion is equitably due to him. It can only affect costs, and with those the Zilla Judge has dealt on the footing that the plaintiff had failed for the greater part of the claim.

Their Lordships will, therefore, recommend to Her Majesty that the decree of the High Court should be reversed, and that the decision of the Zilla Judge should be affirmed with this variation that, instead of the sum of Rs. 25,580, the sum of Rs. 16,556-6-9 will be the sum inserted; to carry interest from the 21st September 1861 to the date of payment.

The appellant will have the costs of the appeal here, but no costs are to be allowed of either party of the appeal in the High Court. The costs as originally given in the Zilla Court will remain.

Appeal allowed.

Agents for appellant: Messrs. J. H. and H. R. Henderson.

Agent for respondents: Mr. Wilson.

[APPELLATE CRIMINAL]

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April 27.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

IN THE MATTER OF THE PETITION OF MATHURANATH CHUCKERBUTTY
AND OTHERS.*

Superintendence, power of, by High Court—24 & 25 Vict., c. 104—Adjournment—Enquiry by Magistrate—Criminal Procedure Code (Act XXV of 1861), ss. 224 & 404.

Where a Magistrate had adjourned an enquiry for a cause not contemplated by s. 224 of the Criminal Procedure Code, the High Court, in exercise of the power of superintendence conferred by s. 15 of 24 & 25 Vict., c. 104, set aside the order of remand.

*Criminal Miscellaneous Case, No. 43 of 1872, against the order of the Magistrate of Malda, dated the 26th of February 1872.

IN this case an application was made to the High Court by the petitioners, praying that an order of the Magistrate of Malda, dated the 26th February 1872, postponing the case in which they were defendants, might be set aside, and that the defendants might be discharged or brought to trial at once without any further adjournments.

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The facts of the case, as stated by the Counsel for the petitioners, and in an affidavit of one Mahanand Gangooly in support of the application, were as follows:—Iswar Chandra Roy, zemindar of Chanchul, died on or about the 8th October 1871, leaving two widows, Shideswari Chowdhrani, his first wife, and Bhuteswari Chowdhrani, his second wife. The Magistrate of Malda, on hearing of Iswar Chandra's death, ordered Bhagabati Charan Chuckerbutty, a Police Sub-inspector, to enquire whether the deceased had left any will. In obedience to this order, Bhagabati Charan went to Chanchul on the 21st November 1871, and reported that the deceased had executed an *anumati-patra* (a deed of adoption) long before his death, and had caused it to be registered in the Purneah Registry Office on the 4th January 1855; that the deceased had also submitted a petition to the Judge of Purneah, in which he informed the Judge of the execution of the deed of adoption; and lastly that he had executed a will on the 18th Aswin 1277 B. S. (3rd October 1870), a few days before his death. The affidavit also stated that the Sub-inspector had reported that when the will was produced before him, one Ramkrishna Bhattacharjee, the brother of Bhuteswari Chowdhrani, the younger widow of the deceased, was present; that along with his report, the Sub-inspector sent in copies of all the three documents mentioned above for the perusal of the Magistrate; and that the Magistrate of Malda, while writing his final report, about bringing the estate left by the deceased under the Court of Wards, gave it as his opinion that the will was not a genuine document, and also made some remarks as to there being no criminal prosecution in respect of the forgery of the will. This report is dated the 18th April 1871.

On the following day, Hira Lal Das, representing himself to be the *karpardaz* (manager) of Bhuteswari petitioned the Magis-

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trate of Malda, to enquire into the forgery of the will. The Magistrate upon this, on the 21st April, took the deposition of Hira Lal Das, which was as follows:—"I am gomasta of Bhuteswari Chowdhrani of Kurba. Shideswari Chowdhrani herself is charged that she forged the will, through whom I cannot say. When the will was forged, the accused was not present himself. She instigated the forgery of the will. Many people say that Shideswari forged the will. If Gabinda Das of Bachamari will tell about it." Upon this the Magistrate issued a summons against Gabinda Das, and ordered the police to make enquires.

In the meantime the Magistrate, on behalf of the Court of Wards, took possession of the estate left by the deceased from the hands of Shideswari Chowdhrani. The affidavit continued:—"And I am informed and believe that, owing to treatment which the said Srimati Shideswari considered as extremely harsh and oppressive, she left Chanchul on the 20th June, and many of her principal servants also left Chanchul at the same time."

After the Police enquiry was completed, the Magistrate took the deposition of the inspector Mahim Chandra Ghose, who had made the enquiry, and who deposed as follows:—"The evidence taken by me shows that the charges of forgery of a will for purposes of cheating is made out against the following persons:—Bharat Chandra Sirkar, Ramkrishna Achari, Rammohan Khansama, Ramkishor Sen, and Mathuranath Chuckerbutty. The evidence will prove that they, on or about the 10th or 11th of Aghran 1277 B. S. (24th or 25th November 1870), at Chanchul, fabricated a document purporting to be a will executed by the late Baboo Iswar Chandra Roy of Chanchul on or about the 3rd October 1870. This will is a forgery; and those men intended to cheat the complainant Bhuteswari out of her half share in the property left by the late Iswar Chandra Roy, and to get possession of the whole estate. I apply for warrants against the above five accused, as I believe them to have absconded from this district. I searched for them, but they could not be found near Chanchul."

The Magistrate accordingly issued warrants against Ramkishor Sen, Mathuranath Chuckerbutty, Bharat Chandra Sirkar, Rammohan Khansama, and Ramkrishna Achari.

It was stated in the affidavit that the defendants were not at Malda when the warrants were issued, they having left Malda as stated above; the Magistrate therefore issued a proclamation for the defendants to appear on the 10th December 1871, and at the same time attached the properties, moveable and immovable, of all the defendants. The defendants Ramkishor, Mathuranath, and Bharat Chandra, in the meantime surrendered themselves, and the case was fixed to come on on the 3rd January 1872. The Magistrate refused to admit them to bail. On the 3rd January, the Magistrate postponed the case to the 24th January, on the ground that he would not be able to remain in the station to complete the preliminary investigation. He further ordered summonses to be issued against eight new witnesses, without (it was stated) being at all satisfied that they were material witnesses. The case came on on the 24th January before a new Magistrate, who recorded the deposition of one Police inspector and of one Kailas Chandra Mookerjee, but did not take the deposition of the other witnesses who were present. The objection was taken before the Magistrate on behalf of the defendants that the preliminary investigation could not proceed, as the document was not forthcoming, and even the copy produced was not proved. The Magistrate upon this summoned Bhagabati Charan Chuckerbutty to give evidence, and made that the ground of postponement. Again, before the 15th February, the Magistrate postponed the case to the 26th February, on the ground that he would be in the Mofussil on the 15th.

On the 26th February the case came on for hearing, and the defendants were again represented by Counsel. The Magistrate examined certain witnesses, among whom were Hiralal Das and Mukadacharan Mazumdar.

Hiralal said :—"I knew the deceased Lwar Chandra Roy. I was a servant of his. I was ameen of the Bagmara Kothi. I was appointed to his service in 1276 B. S. (1869-70). He died on the 22nd Aswin 1277 (7th October 1870). I know the three defendants now in Court, Mathuranath Chuckerbutty, Ramkishor Sen, and Bharat Chandra Sirkar. I heard that Shideswari Chowdhrani and Ramkishor Sen prepared a will, purporting to

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be the will of Iswar Chandra Roy; that will was a forgery. I have never seen the said forged will. I learned that Iswar Chandra Roy never made any will. I used to get Rs. 6 a month as salary from Iswar Chandra Roy. He did not dismiss me. Rani Shideswari dismissed me. I was dismissed from Aghran 1277 (November 1870). I took service with Rani Bhuteswari from Baisakh 1278 (April 1871); and about ten days or so after I took service with her, I brought the complaint in this case regarding the forgery of the will."

Mukadacharan Mazumdar said:—"I know the three defendants, Ramkishore Sen, Mathuranath Chuckerbutty, and Bharat Chandra Sirkar, now in Court. I did not see them forge any will on the 9th or 10th Aghran 1277. I saw Ramkishore Sen and Ram Tanu Das sitting in the veranda of the *diwānkhāna* at Chanchul, and Bharat Chandra Sirkar, Mathuranath Chuckerbutty, Ramkrishna Achari, and Dindayal Mazumdar, afterwards joined them in the *diwānkhāna*. Rammohan Khansama after that shut the door, and told Biseswar Sing, jemadar, to watch, and not to let any one come. This was before evening. I then went away. I afterwards asked Jagadis Mazumdar, servant of Shideswari Rani, why they shut the door and kept watch? He said that some writing had been going on (what writing I did not know), and that one man was to watch, and that the estate would not come under the Court of Wards."

The evidence of the other witnesses was not important; two of them stated that they had heard that Iswar Chandra Roy had made a will before his death. The others stated that they knew nothing about the case.

The Magistrate then postponed the case to the 12th March in order to take the deposition of Bhagabati and ordered a warrant to issue against him, although the summons issued against him had not been served upon him, and put the accused under recognizances.

The Counsel who defended the accused protested against the postponement, and objected to the prosecution proceeding any further, as there was no evidence at all against any of the prisoners, and the document said to have been forged was not produced.

The affidavit also stated that every time the case came on for hearing, the defendants were obliged to take Counsel and a vakeel from the High Court at a great cost.

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Upon the petition of the petitioners, an order had been issued by Bayley and Markby, JJ., that the prosecutor Hiralal Das should show cause why the orders of the Magistrate of Malda dated respectively the 3rd January, 15th February, and 26th February 1872, should not be quashed upon the grounds stated in the petition.

Mr. *Woodroffe* for the petitioners.

Mr. *Fergusson* for Hiralal Das.

Baboo *Jagadanand Mookerjee* for the Government.

Mr. *Woodroffe*.—The Magistrate was wrong in issuing warrants against the petitioners under the circumstances of the case. It was wholly unwarranted and illegal to issue the warrants and to refuse bail when the accused were arrested, when there was no evidence of a forgery having been committed. Before persons are arrested, there must be knowledge of the fact of an offence having been committed derived from legal testimony,—*In the matter of the Petition of Surendra Nath Roy* (1) and *In the matter of Mahesh Chandra Banerjee* (2). [Couch, C. J.—Here there was a formal complaint on oath.] In the case last cited, it is laid down that a Magistrate must ascertain the charge before issuing a warrant. Evidence must be evidence of an offence. It is no evidence where a witness says he knows nothing. The force of a warrant is exhausted when the prisoners are brought before the Magistrate. Then the evidence must make out a reasonable case to justify further detention. These warrants must be set aside.

The repeated adjournments were upon insufficient grounds, because, from the evidence already taken, there does not seem to be any reasonable prospect of better evidence being obtained.

(1) 5 B. L. R., 274.

(2) 4 B. L. R., App., 1.

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They were also made in contravention of s. 224 of the Criminal Procedure Code, inasmuch as they were for a longer period than fifteen days.

Baboo Jagadanand Mookerjee.—He would not object to any application for expediting the Magistrate's proceedings, or even for fixing a day for the trial. A Magistrate has the power to postpone a case from time to time, from motives best known to himself. [COUCH, C.J.—A Magistrate cannot be allowed to go on postponing a case from time to time in an illegal manner, without notice being taken of his conduct. A Magistrate, being busy in the interior in his executive capacity, is not a reasonable cause for such repeated postponements.] The Court cannot interfere in such a case under s. 404 of the Criminal Procedure Code, as there is no error in a decision, because there is no decision yet. This Court has no jurisdiction in such a case—*Queen v. Thomas Brae* (1). The language of s. 404 is there said to be hardly applicable to a preliminary enquiry by a Magistrate.

The last order adjourning the case to the 12th of March was in accordance with the law. It is too late now to object to the other postponements by which the parties cannot be said to have been in any way prejudiced. The evidence is not complete now, but other evidence may be forthcoming. *AINSLIE, J.*—The Magistrate in this case is also acting as Collector on behalf of the Court of Wards. It is proper that he should be allowed to proceed in this manner, having an interest in the matter ?]

Mr. Fergusson.—The case did not really come before the Magistrate until the 16th December 1871, when the accused surrendered themselves. Then it was postponed from the 3rd to the 24th of January, and then again to the 15th February. I am not justifying the Magistrate's proceedings as to these adjournments; on the contrary, I must admit that his way of proceeding in this case so far is a scandal upon the administration of justice. On the 26th of February, however, there was a witness, supposed by the prosecution to be an important

(1) 3 W. R., Cr., 64, at p. 67.

witness, absent, who had been served with a summons to appear. The absence of such witness was a good ground for postponing the case, and it is in consequence of this last postponement that the interference of this Court is invoked.

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Mr. Woodroffe in reply.

COUCH, C. J.—(After stating briefly the facts of the case and the purport of the petition, continued):—Now, Mr. Woodroffe complained of the issuing of the warrant, and alleged that there was no evidence to justify its being issued. I think that we ought not to make any order now with respect to that. In the first place, the petition did not ask to have the warrant dealt with at all, nor did the order which was issued upon the petition direct cause to be shown with respect to the warrant. The warrant has long ago fulfilled all that it was required for, and it would be useless now to set it aside. Indeed, in the judgment of Phear, J., upon which Mr. Woodroffe strongly relied, it is stated that the force of a warrant of arrest is at an end when the prisoner is brought before the Magistrate. So also, with respect to the two orders of remand dated the 3rd of January and the 15th of February,—they have come to an end; the petitioners have appeared in pursuance of them; and a further remand has been made; and the real question is whether the remand which was made on the 26th of February, by which the case was postponed until the 12th of March, and the petitioners were put under recognizances to appear on that day, ought to be allowed to stand. The power under which the order was made is contained in s. 224 of the Code of Criminal Procedure, which provides that “if, from the absence of a witness, or from any other reasonable cause, it shall be come necessary or advisable to defer the examination, or further examination, of witnesses, it shall be lawful for the Magistrate, by a written order, from time to time, to adjourn the enquiry, and to remand the accused person for such time as shall be deemed reasonable, not exceeding fifteen days.”

Mr. Woodroffe relied very strongly, as it appeared to me, on a passage of the judgment of Phear, J., in the case of

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In the matter of the Petition of Surendra Nath Roy (1), in which the learned Judge said that a Magistrate cannot lawfully commit to prison, or remand a prisoner who is before him without sufficient grounds; and in the complete absence of evidence, there can be no grounds. It appeared to me at the time that Phear, J., was there contemplating a case where there was no evidence at all, and that his language must be read with reference to such a case. On looking at the judgment, that seems to be so, because in a subsequent paragraph, he says:—“After the 2nd of November, the case changed. At that time evidence was produced before the Magistrate on which he could rightly, in the exercise of his judicial discretion, hold that the persons charged ought to be committed to prison, either to await trial, or for safe custody, during the adjournment of the enquiry.” And when we refer to the statement of what took place in the case from time to time, it appears that, on the 2nd of November, a witness was partly examined. It is said “that, on the 2nd of November, after the first portion of the evidence of the said Nabin Roy was recorded, Mr. Munro directed that the witnesses who had then been sent by the Police should be kept in custody in Mr. Munro’s house.” It would therefore seem that Phear, J., was of opinion that, if a witness had been even partly examined, the Magistrate would have power to remand; and the judgment does not support what it was quoted for by Mr. Woodroffe.

We have, however, to consider what is the power which is conferred upon the Magistrate by s. 224. It is said that if, from the absence of a witness, or from any other reasonable cause, it shall become necessary or advisable to defer the examination of witnesses, it shall be lawful for the Magistrate to adjourn the enquiry. It appears to me, looking at the language of this section, that, if there is not a proper cause, a cause such as is described, a Magistrate has not power to adjourn the enquiry; it is not lawful for him to do it. A Magistrate is not at liberty, arbitrarily, or for any reason which he may think sufficient, to adjourn the enquiry; it is only to be in the cases men-

(1) 5 B. L. R., 275. at p. 291.

otined. And although an improper adjournment of the enquiry by a Magistrate, an adjournment on a ground which could not be said to show that it was either necessary or advisable, might scarcely be said to be an error in the decision upon a point of law, or to involve any question of law, and s. 404 of the Code of Criminal Procedure might possibly not enable this Court to interfere, we have, by the 15th section of the Act under which the Court is established, a power of superintendence which enables us to deal with such a case. I think it enables us, where a Magistrate has adjourned an enquiry, when it was not lawful for him to do so under s. 224, to set aside the order. Here there was not the absence of a witness, or other reasonable cause, which made it necessary or advisable to adjourn the enquiry. The witness whose absence appears to have been given as a reason for the adjournment was the inspector who made the report. Assuming that, if called, he would have deposed to all the facts stated in that report, it appears that all that he could have proved would have been that the will was produced to him, and was afterwards returned; and that evidence being taken, there really would have been no evidence to justify the detention of the parties upon a charge of forgery of the will; it would really have been just the same as if there had been no evidence whatever against them.

The case appears—and it seems to me it was admitted by the government pleader, and also by Mr. Fergusson, who appeared for the prosecutor—to have been postponed in a manner which could hardly, even by them, be justified. There was not any evidence taken which could be made the foundation of a charge; and the Magistrate appears to have been influenced in the course which he took by the expectation that, after some time and by dint of enquiry, some evidence might be obtained. But a Magistrate is not justified in keeping parties under recognizances in the way in which he did on this occasion, possibly from soon after the 5th of July, when the warrant was issued, but certainly, from the 3rd of January, the day first fixed for [the hearing, until the 12th of March, with this charge hanging over them, and remanding them from time to time in an illegal manner, the two previous remands having exceeded

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fifteen days. This is a case, I think, in which the Court may well exercise its power of superintendence, and set aside the last order of remand; and it seems to me desirable that Magistrates should understand that the power conferred by s. 224 is a power which is only to be exercised in cases which come really within the terms of that section. It is not a power conferred upon them to be exercised in an arbitrary manner, and not according to rule, but a power which they ought to be careful in exercising.

Therefore, the order which we shall make is that the last order of remand, that of the 26th February, will be annulled. The consequence of which will be that the petitioners will not be liable to appear in accordance with the recognizances which they gave. If evidence is afterwards discovered, which would justify the charge of forgery being brought against them, the Magistrate is not precluded, by the order of which we now make from taking proceedings again.

Order set aside.

[PRIVY COUNCIL.]

P. C.*
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LALA BANSHIDHAR (DEFENDANT) v. THE GOVERN-
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ON APPEAL FROM THE 'SUDDER DEWANY ADAWLUT,
 NORTH-WESTERN PROVINCES, AGRA.

Novation of Bond—Principal and Surety—Evidence.

B became surety under bond to Government for the treasurer of a Collectorate. The Collector yearly examined the accounts, and struck a balance which he certified to be correct. *B* on each such occasion, executed a new bond, but the old bonds were not cancelled or given up. On subsequent enquiry, the treasurer was discovered to have embezzled moneys during each year. *Held that*, on such discoveries being made, *B* was still liable under the old bonds, there having been no novation.

Where the Courts below had admitted evidence not properly admissible, the Judicial Committee examined the whole evidence, and being satisfied that there was independent of that inadmissible evidence, sufficient to justify the decision of those Courts, dismissed the appeal.

* *Present*:—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, AND SIR LAWRENCE PEELE.

THIS was an appeal from the decision of the Sudder Court at Agra, dated 24th January, affirming that of the Judge of Mirzapore. 1872
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The action was brought by the Government against the appellant as surety for one Srikrishna Chowbay, the treasurer of the Mirzapore Collectorate, on four surety bonds dated April 1841, February 1842, February 1845, and March 1846.

At the end of each year, the Collector examined the accounts, and a balance was struck and signed by him; a certificate was also signed by him as to the correctness of the cash according to the accounts. The first balance and certificate were dated in December 1841, and the appellant afterwards executed a new bond in terms similar to those of the former one, and so he did, on each occasion of a certificate being given, but the old bonds were not taken back by him. In 1848, the Government found out that some embezzlements had taken place, and a searching investigation brought to light the fact that Srikrishna, in 1842, soon after his appointment, had, by false entries and transfers, caused it to appear that the cash balance was correct, while he had, during the whole tenure of his office, been appropriating large sums. Upon this the Collector insisted upon the appellant making good the defalcations, and proceeded in a summary way to compel him to do so. The appellant being forced to pay, brought an action in the Supreme Court at Calcutta to recover the money so paid under duress, and recovered judgment against the Collector. In their judgment, the Supreme Court Judges pointed out that the only way in which the appellant could be made to pay was by an action on his surety engagement. The Government restored the money and brought the present suit on the bonds, the treasurer Srikrishna having in the meantime been prosecuted and convicted of the embezzlements.

The defendant, at the hearing of the case, contended that as, at the hearing of his case before the Supreme Court, the Judges considered that there had not been sufficient evidence of the defalcations having been committed by Srikrishna to make the appellant answerable, that decision was a bar to the suit; that the defalcations were not in fact committed by Srikrishna, but by other employes; that he could not be held

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answerable for the losses incurred previous to the date of the last bond; and that if any loss had been sustained, it was in consequence of neglect on the part of the Government officers in investigating Srikrishna's accounts, and allowing him control over the money in a way not contemplated by his surety.

In the course of the trial the Judge allowed depositions taken and the result of enquiries made in the absence of the appellant, and on the criminal trial of Srikrishna, to be put in as evidence.

The defendants put in as evidence a bill of discovery filed by him in support of his suit in the Supreme Court with the Collector's answer setting out particulars of the defalcations. He also put in the evidence of Srikrishna before the Supreme Court denying the defalcations with which he was charged.

The Judge decided in favour of the Government, and the Sudder Court, on appeal, affirmed the Judges's decision.

The appellant then appealed to the Privy Council.

Sir *R. Palmer*, Q.C., and Mr. *Leith* for the appellant, contended that the decisions were founded upon evidence clearly inadmissible; and that if the inadmissible evidence consisting of the depositions taken on the trial of Srikrishna and the investigations made by the local authorities were rejected, there was no evidence of any embezzlement on the part of Srikrishna. They proceeded at great length to analyse the evidence. They also contended that there was such gross neglect on the part of the Government authorities in checking the accounts, and leading the appellant, on his signing the new bonds, to believe that the balances were found to be correct, that they could not proceed to recover any losses sustained previous to the last bond; and that in fact each bond was a new contract in substitution of the previous one.

Mr. *Forsyth*, Q.C., and Mr. *Merivale* for the Government, went also in detail into the accounts; and while admitting that some evidence had been wrongly admitted they contended that, independently of that evidence, there was sufficient evidence to support the charges; and that, under Act II of 1855, s. 57, the judgment should be upheld.

Their Lordships delivered the following judgment :—

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This was an action brought on the part of the Government of Bengal against Lala Banshidhar, who was a surety for the treasurer of the Mirzapore Collectorate; and it was brought to recover a sum with interest of upwards of Rs. 60,000. The case on the part of the Government was that, between 1843 and 1848, the treasurer had been a party to the embezzlement of the sums of money in question. Now the first defence that was relied upon was a defence in point of law. It appears that the surety bonds were three times renewed. The treasurer occupied that position for a period of eight years. The bonds were not renewed every year; they were three times renewed, and in the other years the Government did not renew the bonds, but they made an inquiry into the sufficiency of the security. The first point that was argued on the part of the appellant was that, by the renewal of the bonds, each bond, as it was renewed, was in fact a novation, so that no action could any longer be maintained upon the old bond, but it must be taken that, by an examination of the accounts, the Government had satisfied themselves that no fraud or embezzlement had been committed up to that time; and that though they did not give up the old bond, yet, practically, the new bond was to be taken in lieu and satisfaction of the old bond; so that the surety only became responsible for the deficiencies which might take place subsequently to the giving of the new bond. If that defence was correct, the consequence would be that there would be a defence to all, except any deficiencies which might be proved subsequently to the giving of the last bond. Their Lordships are of opinion that that defence cannot be maintained. It rests entirely upon this, that we are to infer that each new bond was given in substitution for the old one. The Sudder Court says that in their judgment the new bond was given probably under a misapprehension of what was the proper construction of the orders of Government, which require that from time to time—in fact, annually—there should be an examination into the sufficiency of the securities. They seem to have thought that made it necessary, or, at any rate, desirable that new bonds should be given; but however that may be, the question simply

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is—are we to infer that it was intended to discharge the old bond if, after the giving of the new bond, a discovery was made, though unknown at the time, that frauds had been committed during the time that the old bond was in existence? If, indeed, the Government had known of the frauds, that would raise a totally different question for then, of course, they ought to have warned the surety, and not allowed him to go on by giving a new bond. But that is not contended. It is not suggested that until the year 1848, when the discovery was made by one of the parties in the office making a statement to the Government, the Government had any suspicion whatever that any frauds were going on. The old bonds were never given up. The surety did not ask for the old bonds. There is nothing to show that he had any idea that he was discharged, or that he had a right to the old bonds: and their Lordships think that the explanation given by the High Court is the correct one; but whether it is correct or not, there is nothing to show that the Government intended to give up or abandon any claim that they had upon any of the bonds. Then it was argued that at any rate the Government having satisfied themselves, by their Collector and by the examination which they made of the accounts, that no fraud had been committed, and that the accounts were correct, the new bonds were given upon the faith of the accounts being correct, and that they are to be estopped from saying that the accounts were incorrect. There does not appear to their Lordships to be any ground for that argument. There must be such gross negligence as almost to amount to a participation in the fraud, before the fact of the Government examining into the accounts, and not discovering the frauds sooner could operate as a discharge. The object of having securities is that, if secret embezzlements take place, the Government may have a security upon which they can rely.

Then with respect to the case itself. The mode in which the alleged frauds were committed is stated very clearly in the Judgment of the Zilla Judge. He puts it in this way:—"The Government asserts that the embezzlement occurred in this way, viz:—The treasurer received sums of money on account of revenue of villages, &c., which he did not pay into the

Government treasury, or enter in his Hindi *siāhā* (1); but, in connivance with the *siāhā-navis* (2) and others, entered in the Persian *siāhā*, as received by transfer, although there were no deposits on account of the said villages, &c., from which payments by transfer could be made, at the same time referring in the said *siāhā*, and also in the receipts he gave for the said sums to orders issued for payment by transfer from *bonā fide* deposits relating to other villages, &c., which payments again were made up from moneys paid into the Government treasury in advance on account of other villages, &c., which will be adverted to below. Banshidhar, in his answer, does not positively deny that the sum sued for has not been embezzled, but he insists that Srikrishna never received the items forming that sum, or they would be in his Hindi *siāhā*; and moreover, *irsāls* (3) have not been adduced to show that the sums were sent to him to take charge of; and that, in short the Persian *amla* and *tehsildars* are the embezzlers, and, not Srikrishna. I consider that the statement of the Government proved as to the amount embezzled."

Now, that being the sort of charge that was made, it was strongly argued on the part of the appellant that it was proved only by inadmissible evidence; and, indeed, it is on account of this allegation that the charge was only supported by inadmissible evidence that their Lordships have been induced to hear this case at such considerable length as they have done; because, if it had been simply an ordinary case in which it was a pure question of fact, which both the Courts below had agreed on, it would have been governed by the ordinary rule that, unless it could be clearly shown that the Court below had made some plain mistake, the judgment ought to be affirmed. Now, it is alleged that they made a plain mistake in this way; that there was a great deal of inadmissible evidence, to which both the Courts below gave weight—not only evidence which was inadmissible by the law of England, but evidence which ought not, in fairness and justice, to be allowed to have any weight.

That alleged improper evidence consisted principally of this:—

(1) Account-book.

(2) Accountant.

(3) Lit. sending; *irsāl-nama*, an invoice.

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When the alleged frauds were in the first instance discovered the first thing which was done was that the Collector went, down to examine into the matter, and to examine everybody who could give any information upon the subject, to find out what the truth of the matter really was, and he took a great number of depositions, and no doubt examined those persons from whom he thought he could get information privately, when neither Srikrishna nor Banshidhar were present. Now, certainly, if any substantial reliance had been placed upon those depositions—if this case could not be proved independently of them, their Lordships would have been disposed to think it would certainly have been wrong to place any weight upon their evidence. If they were alive (and there is nothing to show that any of them, except Srikrishna himself were dead), they ought to have been called at the trial; and to rely upon an *ex parte* deposition of a witness who might have been called and cross-examined at the trial, would not be a practice that their Lordships would at all agree with, or think that any weight should be given to. But, as respects Srikrishna himself, he was frequently examined; first he was examined by the Collector, and subsequently he was examined by the Magistrate, and then afterwards he was tried and found guilty; and subsequently an action being brought (into the details of which it is unnecessary to go at present,) he was examined again, and then alleged that he was innocent. Now, their Lordships do not consider that his evidence ought necessarily to be entirely rejected; it probably would not be satisfactory to support a case upon an admission made by him alone, if the other evidence was not sufficient to amount to strong evidence against him; but if there is strong evidence against him, then probably the examinations (at any rate the examinations before the Collector) might be referred to, for this purpose at least, namely, to see if he could give any satisfactory explanation of the charges which were made against him.

Then, as respects those depositions which their Lordships think inadmissible, they do not find, on carefully considering the judgments both of the Zilla Court and of the Sudder Court—certainly of the Sudder Court, and their Lordships are disposed to think of the Zilla Court also—that any reliance was placed upon them, and, therefore, they may be rejected. The

real question is, therefore, first of all taking the evidence which must be and everybody says is admissible, how does the matter stand? There are three things to be made out, that there was an embezzlement; that the sum embezzled amounted to the sum claimed; and that Srikrishna, the treasurer, had a guilty knowledge of, and was a party to those embezzlements. Now, was there an embezzlement of the amount claimed? Upon that question there really was no serious dispute in the Court below. It is charged plainly in the plaint,—the answer does not in plain terms state that there was no embezzlement at all. On the contrary in the very first answer, the substantial defence is that, if there was an embezzlement, Srikrishna was not a party to it. But it did not rest there. All the voluminous documents with which the Government supported their case, the bill of discovery having been filed previously, were open to examination on the part of the defendant. Then the accountants were called, and they stated what the result of all the documents was; they stated that they did show a deficiency in the accounts to the amount claimed,—that is the only possible way in which a fraud of that kind can be proved, because it is quite impossible for the Court itself to go into every single item of the voluminous accounts. In this country it is the practice to call an accountant, who goes through the books; he makes a summary of the accounts, and the other side are left to question them, and this case was conducted in that way. Now, the appellant appointed persons who were perfectly competent for their duty, he being himself a large and extensive banker, and they appear to have been clerks of his own who themselves went through these accounts, and after they went through them, they were asked did they want any more documents,—was there anything that the Government could produce which they required? They said there was nothing more. They were examined. Their evidence has been read to their Lordships; and the result of that evidence is that an examination of all these documents tends to show that there was an embezzlement in these accounts to the amount stated. But they rest their defence upon this: they say these accounts do not make out that Srikrishna, the treasurer, was a party to the embezzlement. The result come to, from an examination of the accounts as they allege, is

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that they only show that the persons who kept the Persian accounts had been parties to the embezzlement, but that they do not show that the treasurer had been a party to it.

The question, therefore, in their Lordships opinion is reduced to this. Is there satisfactory evidence that Srikrishna, the treasurer, was a party to these embezzlements? And that also in a great measure resolves itself into this, is there satisfactory evidence that these sums in question were received in cash at the treasury at all? For if they were received in cash, then, according to the ordinary course of business, they were handed over to the treasurer himself; and, inasmuch as the Persian clerks never handled the money, it is impossible to see, if the money really was brought into the treasury, how, by any manipulation of the accounts, the Persian clerks, who had not got the money, could possibly carry out these frauds, or embezzle the Government money without the knowledge and assistance of the treasurer.

How then does the question stand as to the way in which the payments were made? The actual practice was this:—The payments were either made in money, or were made by transfer of deposits. When they were made in money from the village authorities, an authority to receive the money was procured to show that it was the intention of the person who had the money to pay in cash. He brought the money to the treasurer. The practice was that it was carried into the room where the treasurer was, and it is stated by some witness that somebody else was always there with him, and there the money was paid over. There was a receipt, and there is produced a form of the receipt for such cash payment, and that formed his receipt. Then it is the duty of the treasurer to see that that amount of money is entered in the Hindi account. Then it is also taken to the Persian clerks, and they have to enter the receipt of the money in the Persian books, and then the receipt has also to be taken to some other clerks, who enters it in the *dakhila* account-book, and then the receipt (whether before or afterwards does not clearly appear) is signed by the treasurer, and that is given to the person who brought the money. Then it would appear that he takes it back to the village authorities, and in some cases the village authority also puts his name upon the receipt.

Now, when the money is paid by a transfer of deposits, then it appears that these deposits either may be in the treasury itself, having been previously paid in cash, or they may be in some other treasury, as at Benares, where it may be more convenient to the landowner to make his payment. If that is the case, an order always has to be got from the Collector to authorize that transfer by way of deposit, and then that order appears to be brought to the office, and upon the authority of that order the transfer is made. Now there are many of these cases. The Court below divided them into three lists, and for the present reference will only be made to the first class, that is, where the receipts were actually given. Now in these cases, the forms of the receipt are set out; and the first and the strongest evidence against the treasurer is this, that the receipts are given in a form which, on the face of it, appears to be exclusively applicable to a payment in money; and looking at the form of the receipt, it is impossible to say that it does not, upon the face of it, purport to be a receipt for money. There is a number, and in the first column there is the name of the *mehal*, and in the second column there is the name of the *mál-gusár* on whose behalf the payment is made. Then there is the amount received, and the items in respect of which it is paid. Then there is the date upon which the money was deposited, which perfectly plainly means the date of the payment, which is the 30th of March 1844 upon this receipt which is now before us. Then there is the name of the person through whom the money was deposited, which also perfectly plainly means the name of the person who brought the money to the treasury and paid it in; and then there is the date upon which the receipt was given, which is the 30th of March 1844, being the same date as that upon which the amount was paid. Now this is written out in Persian, and purports to be an acknowledgment of the receipt of cash. It is signed at the bottom by the treasurer himself, with a memorandum—"Rs. 743 received by transfer by a perwanna No. 2669," in the particular one to which we are referring.

Now, there is perhaps some little difficulty, or, at least, their Lordships had some little difficulty in the course of the argument,

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in discovering exactly what was the mode of giving a receipt when the payment really was made by a transfer. Although there is perhaps no direct evidence of what the form of it was when the payment was made into the treasury by deposit, whether it was the treasury at Mirzapore, or the treasury at Benares, no doubt some receipt, acknowledging that payment, must have been given. Several of the witnesses who were examined upon the part of the Government stated that no receipt at all was given when a deposit was transferred, at the time when the transfer was made. In the judgment of the Sudder Court, which appears to have been taken principally from the allegations in the plaint, which are not certainly specifically, if at all, denied by the answers, it is stated that at some time or other, whether the practice was first introduced by this particular treasurer, or whether it was introduced before, is not perfectly clear; but, at any rate upon many occasions, a receipt was given, but that alterations were made in the form of it, as one would suppose would be the case, as otherwise it would represent what was positively untrue; and that it would contain a reference in the body of it, not merely after the signature at the end, to show that it was merely a receipt for a transfer, and that no money was paid at all at the time when it was given. Therefore the receipt forms the first evidence and very strong evidence against the treasurer.

Then that is confirmed in a great variety of instances by evidence upon the part of the village authorities, the *canungoes*, who say that, as respects those villages, they have no deposit accounts,—that it was the ordinary practice to pay in cash; that, secondly, confirms the statement that the payment was in cash. Then there is no entry of a receipt in cash in the Hindi *siáhá*, which would make it clear, and which in fact is not seriously denied, that, if it was paid in cash, beyond all question, the treasurer was a party to the embezzlement. Then in the Persian *siáhá*, they are entered upon the day upon which the payment was made, and it is very important to observe that they are entered as paid in cash. In examining the items, it is quite plain that in the body of the *siáhá* they are entered as paid in cash; but, of course, if they had been summed up in the abstract of the day's proceedings as having been paid in

cash, then the amount of cash in the Persian *siáhá* would have differed from that in the Hindi *siáhá*, and then, when the Collector came to examine the books, the fraud would have been discovered directly. Therefore, though they are stated in the body of the Persian *siáhá* as received in cash, yet in the summing up they are not summed up in the cash column, but they are summed up as a part of those sums which were received by transfer of deposit. We also find in these Persian *siáhás* that day by day, not only is the ultimate balance signed by the treasurer, but the pages are also signed. It is said that he does not understand the Persian language, but there is no satisfactory evidence of this, and it is very improbable that the Persian clerks should have dared to go on day by day making those false entries which the treasurer could have discovered at any time.

Then, besides that, there was another clerk, who kept a book of receipts, called the *dákhilá* account, in which nothing was entered, except payments in cash, and in which we find these entries as being received in cash. Now, taking all that evidence of the payments being received in cash, are we to believe that the landowner or his agent who brought the money, the village authorities, the Persian clerks, the persons who kept the *dákhilá* books (of whose guilt there is no evidence whatever) were all combined to cheat the treasurer, and that they should succeed during this long period of years in cheating the treasurer, though, at the very time they cheated him, they brought these documents day by day to him for his signature, thus giving him an opportunity of detecting them?

Moreover, if one looks at the accounts kept at the time, it will be seen that there is no reference in them to the deposit accounts from which the sums embezzled were fraudulently pretended to be taken. There is no reference to them in the Hindi *siáhá*, or the Persian *siáhá*, or in the *dákhilá* book. The only place in which you find any reference to them is in the receipts themselves in the hand-writing of the treasurer himself. There you find a reference to the alleged transfer, and that is not denied. It is admitted by the accountants of the defendant that in reality these transfers were all false and fictitious, because in reality they were not transfers from the

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accounts of the landowner who made the payments, but were in reality transfers from totally different accounts which had nothing to do with these particular receipts; but being afterwards, as it appears, made up in some other way, which it is not necessary to inquire into, the Courts below agreed in the belief that the money was really received in those cases, and their Lordships certainly do not see any ground at all for differing from that opinion.

This morning Mr. Forsyth has taken us through two selected instances, and we have examined and traced these two cases all through, so as to enable us to see what was the effect of the entries; and that which has been stated has been proved in these cases. We have not thought it necessary to go beyond that; nor is it necessary to consider in detail whether there is sufficient evidence in those cases in which the entries are not produced, but only the copies of the receipts,—their Lordships must consider them as copies of the receipts;—nor is it necessary to go into the detail of those cases where no receipts at all are produced, because it is quite clear that the whole of the frauds are upon one system from beginning to end; and when it is once shown and proved that there were frauds to this amount, and how they were concocted and carried out, and when it is further shown clearly from certain instances that there is evidence, beyond all question, that the treasurer was a party to them, the inference is very strong indeed that he was a party to all the frauds. It never could be believed that some of the frauds were committed with the knowledge of the treasurer, he receiving the money, and that the rest of the frauds were not practically committed in the same way.

Upon these grounds, therefore, their Lordships have come to the conclusion that the judgment of the Court below was right, and that it was fully supported by the evidence, and hence they will recommend to Her Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Agent for appellant: Mr. Wilson.

Agents for respondent: Messrs. Lawford and Waterhouse.

[PRIVY COUNCIL.]

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ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

*Hindu Will—Deeds of Gift—Construction, Rules for—Maintenance of Son—
Trusts—Life-estates—Estates tail.*

See also
13 B.L.R. 35.
14 B.L.R. 69.
12 B.L.R. 6.
11 B.L.R. 294,
I. L. R. 4 col.
461.

In construing transfers by gift among Hindus, a benignant construction is to be used, and the donor's intention carried out, if ascertainable, to the extent and in the form which the law allows. Thus, if an estate be given by a Hindu to A without words of inheritance, it will, in the absence of a conflicting context, give an estate inheritable as the law directs; if to it be added an imperfect description of it as a gift of inheritance not excluding the inheritance imposed by law, an estate of inheritance would pass; if a gift be in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction is to be rejected; if a gift be to A and his heirs to be selected from a line other than that specified by law, and expressly excluding the legal course of inheritance, the gift is only good so far as consistent with the law—A would take a life-estate, and the other limitations would fail. All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and by Hindu law no person can succeed as heir to estates described in terms which in English law would designate estates tail.

In order to make a gift under a will good by Hindu law, the donee except in the case of an adopted child, or a child *en ventre sa mère*, must be a person in existence capable of taking at the time when the gift takes effect. A child adopted after

* Present :—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, LORD JUSTICE JAMES LORD JUSTICE MELLISH, MR. JUSTICE WILLES, SIR MONTAGUE SMITH, SIR R. P. COLLIER, AND SIR LAWRENCE PEELE.

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• man's death, in pursuance of a power given by him, is in contemplation of law begotten by that man.

The law of wills among Hindus is analogous to the law of gifts; and even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred. A person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must, either in fact or in contemplation of law, be in existence at the death of the testator. *Sreemutty Soorjeemoney Dosses v. Denobondoo Mullick* (1) distinguished.

Trusts are not unknown to Hindu law; they can be created for carrying out such intentions as the law recognizes.

There is no reason why a Hindu should not, by will, create an estate for life.

Where the testator left his property to A for life with remainders, showing that A should have no more than a life-estate, but that the testator wished to tie up the estate by provisions in tail, *held*, that A could not be declared entitled to more than a life-estate.

Where a testator directed his property to go in a certain way on the "failure or determination" of estates created by him, it was held that such words contemplated the fact of those estates being legal and valid; and that as they were illegal and invalid, no effect could be given to the directions as to the further devolution of the property.

The will directed that, as to the personalty, the trustees were, after all annuities and legacies had fallen in and been satisfied, to stand possessed of, and interested in, the *corpus* in trust absolutely for the person or persons entitled under the limitations in the will to the beneficial or absolute enjoyment of the real property. The High Court gave the tenant for life the surplus of the interest remaining in the hands of the trustees after payment of the legacies and annuities, but excluded him from any right to the subsequently accruing interest: *held* that he was entitled to the interest of the personalty after such falling in and satisfaction.

Where a son had received as a gift from his father property producing at the time Rs. 7,000 a year, their Lordships, without deciding whether a son could be deprived of maintenance, considered that he had received an adequate maintenance.

All the existing parties interested in a will being before the Court, a decree can be made as to the rights of all Parties. *Lady Langdale v. Briggs* (2) distinguished.

These were cross-appeals from the decision of the High Court (Peacock, C. J., and Norman, J.), dated 1st September 1869, reversing the decision of Phear, J., as to the construction of the will of Prasanna Kumar Tagore. The will and the judgments of the three learned Judges are fully set out in the report of the case when before the High Court (3).

The two tenants for life, Jatindra Mohan and Surendra

(1) 9 Moo. I. A., 133. (2) 8 De G. M. & G., 391. (3) 4 B. L. R., O. C., 103.

Mohan, joined in appealing, and a cross-appeal was preferred by the testator's son and heir, Ganendra Mohan.

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Sir R. Palmer, Q. C. (Mr. Cochrane with him), for Jatindra Mohan (1).—In Bengal a Hindu father has full power to leave his property as he chooses, disinheriting his heirs, and even depriving them of maintenance, and this will has effectually disinherited Ganendra Mohan. There is no intestacy. A gift by will to two sons to the exclusion of the others has been recognized—*Desherel's* case (2); so has a gift to strangers—*Doe d. Munnoo Loll v. Gopee Dutt* (3); so to a gift to the eldest son—*The Nuddea* case (4). The consent of sons is not required—*Doe d. Juggomohan Roy v. Sreemutty Neemoo Dossee* (5); Sir F. Macnaghten's Consideration, p. 318. Such a gift may cause the testator to lose the religious benefits derived through a son, but it is clear that he may make it. [LORD JUSTICE MELLISH.—Would not the son lose his right by becoming a Christian?] He would *ipso facto* have been struck out from right to inherit were it not that Act XXI of 1850 has prevented the change of religion depriving a man of his estate. A Christian, however, could confer no spiritual benefits. The testamentary power is not to be limited, save by positive law. The *onus* of proving such limitation lies on those who contend that it exists. Regulation XI of 1793 has a material bearing on this point: s. 2 recognizes the right of heirs where there is no will. [SIR J. COLVILLE.—That only leaves the testamentary power where it found it.] But it shows testamentary power may be exercised so as to make a sole heir. The Hindu law as it exists in Bengal is to be applied; see. 21 Geo. 3, c. 70, s. 17; Reg. III of 1793, s. 21; Reg. IV of 1793, s. 15. There is no Hindu law against perpetuities. A Hindu may tie up his property—*Sonatum Bysack v. Juggutsoondree Dossee* (6); and *Goberdhun Bysack v. Shamchand Bysack* (7), which is referred to by the Chief

(1) Their Lordships declined to hear more than one Counsel for each of the appellants, Jatindra Mohan and Surendra Mohan.

(2) East's Notes of Cases, No. 224a.

(3) Mort., 80.

(4) 1 Sel. Rep., 2.

(5) Mort., 90.

(6) 8 Moo. I. A., 66.

(7) Bourke, 262.

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Justice in his judgment in *Kumara Asima Krishna Deb v. Kumara Kumara Krishna Deb* (1).

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The testator says the Hindu law is to guide the executors, and he wishes to make as strict a settlement as he can. If he cannot make a settlement with all the limitations, the will should be construed, so as to recognize them as much as possible.

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There is a perfectly good succession of life-estates—*Jordan v. Adams* (2). The will must be construed as a species of executory trust—*Carter v. Barnardiston* (3) and *Mackworth v. Hinaman* (4).

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The Chief Justice has by his decision set aside a large class of cases. It seems to have been assumed that there can be no gift to a person not *in esse* at the testator's death; apparently on the ground that acceptance is necessary to complete a gift. But the Hindu law, differing in that respect from the Mahomedan law, requires nothing of the sort. The meaning of the passage in the *Dayabhaga*, ch. I, ss. 21 and 22, has been misunderstood: actual acceptance is not required—*Rajah Suraneni Venkata Gopala Narasimha Row Bahadoor v. Rajah Suraneni Lakshma Venkama Row* (5); *Shibchunder Ghose v. Russick Chunder Neoghy* (6). An unborn son may be adopted—*Soonder Koomaree Debbesa v. Gudadhur Pershad Tewarree* (7). There may be a good gift to an idiot—*Baboo Kooldebnarain Shahee v. Mussamut Wooma Coomaree* (8). Successive adoptions may take place after the testator's death; Macnaghten's Principles, pp. 83, 84. As to the power to adopt being exercised long after the death of the husband, see *Bamun Das Mookerjee v. Must. Tarnee* (9). The decision of the High Court is wholly inconsistent with the principles laid down in *Sreemutty Soorjeemoney Dossee v. Denobundoo Mullick* (10). In the second report of that case their Lordships said that there is nothing contrary to Hindu law in allowing a testator to give property upon an event which is to happen, if at all, immediately on the close of a life in

(1) 2 B. L. R., O. C., 32.

(7) 7 Moo. I. A., 54.

(2) 9 C. B., N. S., 483.

(8) 1 Marsh., 357.

(3) 1 P. Wms., 505.

(9) S. D. A., 1850, b. 533; 7 Moo. I.

(4) 2 Keen, 658.

A., 169.

(5) 13 Moo. I. A., 113.

(10) 6 Moo. I. A., 526; 9 *Id.*, 123.

(6) Fult. Rep., 36.

being (1). [LORD JUSTICE JAMES.—That does not show that a devise to an unborn son is good.] *Sonatum Bysack v. Jaggut-schindus Dasse* (2) and *Gobordhum Bysack v. Shamaund Bysack* (3) show that the power of alienation may be taken away. The cases of *Mussamut Bhobun Moyes Debia v. Ram Kishore Acharij Chowdry* (4) and *Baboo Beer Pertab Sahoe v. Maharaja Rajender Pertab Sahoe* (5) were also referred to.

The chief Justice says, the testator had no power to create estates in tail; but is this so? The law of primogeniture is not alien to Hindu law, but it is said because the testator has made a bad condition of defeasance, therefore the estate given is void. But it is not so in English law. Why should not the infant represented by Mr. Forsyth take? He was born in the lifetime of the testator, and takes an estate of inheritance in tail.

Postponing the payment of the legacies for the convenience of the estate does not postpone the vesting—see Reper on Legacies, (fourth edition), p. 578; Jarman on Wills (third edition), p. 792; *In re Harri's Trusts* (6). On the subject of vesting, the learned Counsel referred to Fearn on contingent Remainders, p. 121, *Bacon v. Procter* (7), *Bateman v. Hotchkin* (8), and *Jones v. Machilgan* (9); he also laid great stress upon the case of *Humberston v. Humberston* (10), and he commented at length on the cases referred to by the Chief Justice.

Mr. Forsyth, Q. C. (Mr. Leith, Mr. Doynes, and Mr. Mortimer with him), for Surendra Mohan Tagore, in addition to the cases already cited, referred to *Rowun Persad v. Mussamut Radha Reby* (11); Elberling on inheritance, s. 295; Macnaghten's Principles, p. 2; *Thellusson's case* (12); Dayabagha, ch. I, ss. 18, 19; Menu's Institutes, ch. IX, s. 185; the Indian Succession Act, s. 101.

(1) 9 Moo. I. A., 135.

(2) 8 *Id.*, 66.

(3) Bourke, 282.

(4) 10 Moo. I. A., 279.

(5) 12 *Id.*, 1.

(6) 3 DeG. & J., 195.

(7) Turn. & Russ., 31.

(8) 10 Beav., 426.

(9) 1 Russ., 220.

(10) 1 P. Wms., 332.

(11) 4 Moo. I. A., 137.

(12) 4 Vea., 227.

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Mr. Joshua Williams, Q. C., and Mr. J. D. Bell for Ganendra Mohan Tagore.—The technicalities of English law must be thrown aside, and the English notions of legal and equitable estates forgotten. Looking at the will without the aid of English law, trusts according to Hindu law are merely provisions for management, not carrying any estate; and where the management is given in a specific way, as here, to four persons, and one does not accept, the provision fails, and the heir-at-law is entitled to manage. This was the old law in England before 21 H. VIII, c. 4, and is so in Scotland—Bell's Principles, s. 1993. In Bengal, property and the right of alienation go together, but no case can be cited for the total disinheriting of a son. It is argued that free alienation is allowed by Hindu law, while at the same time it is contended that a will preventing alienation is good. He referred to Mr. Montrieu's Cases of Hindu Law, p. 594, as to the different schools of Hindu law, and to Mr. Mayne's Village Communities. A Hindu can only give an absolute gift by will. There cannot be a life-estate in a chattel in English law. A gift by a Hindu to an unborn child is void; no instance of such a gift has been cited, and the vast learning and experience of the Counsel for the appellants have been unable to discover one. There must be a sentient being to accept—Dayabhaga, ch. I, ss. 21 and 22; and the note by Srikrishna. *Kalidas Das v. Krishna Chandra Das* (1) shows that a blind man cannot take as heir; and if the estate be once vested in another, it cannot be divested in favor of the blind man's son. An estate cannot remain in abeyance in favor of an heir not conceived at the time of the death. An attempt has been made to show that in case of adoption, one not in being at the death has succeeded, but that is a very different case. A son adopted must be so adopted by leave of the husband, and he is in fact a posthumous son. It is important to look at the Roman law. Mr. Sanders speaks of that law doing what in fact the Hindu law does; it constitutes a *persona* (2). The *persona* must not be uncertain; the posthumous child of a

(1) 2 B. L. E., F. B., 103.

(2) Sanders' Inst. of Just., Intro., pp. 36, 37, and p. 281, *et seq.*

stranger born after the donor's death, could not take. As the Chief Justice has quoted from Williams on Real Property, p. 242 (ninth edition), it may be allowable to refer to a passage there at p. 253, and to ask if it is advisable to introduce into Hindu law the cumbersome doctrine of uses. The case of *Sreenutty Soorjemaney Dosses v. Donobundoo Mullick* (1) has been referred to, [SIR L. PARL.—There the parties were all alive, and it was merely a question of survivorship.] The cases of *Kumara Ananda Krishna Deb v. Kumara Kumara Krishna Deb* (2) and *S. M. Krishnamamani Dasi v. Ananda Krishna Bose* (3) are important. The case of *Sonatum Bysack v. Juggutsoondree Dosses* (4) has been relied upon; but there the bequest was in favor of an idol; the family was governed by the Mitakshara law; and the decision was that it was a gift to the four sons and their offspring in the male line, so long as the property remained joint, they supporting the idol; but there the property being ancestral was inalienable. The case of *Rewun Persad Mussamut Radha Beeby* (5) was a case of contract, and not of a pure will.

By the cross-appeal we claim the whole fee-simple. All the gifts are void. When all is done which is pointed out by the will (and that may be 100 years hence), the first donee is to take a life-estate. The will says:—"I give and devise (subject always to the devise to [the trustees]) all, &c., to and for the following uses," which means these are the persons to whom I intend at some future time the property shall be conveyed. I intend the property to remain in the trustees, and out of the income, debts, &c., are to be paid, and then, perhaps 100 years hence, there is to be conveyance first to Jatindra Mohan for life. The whole will is reconcileable only on one theory, *vis.*, that, save the legacies immediately payable, nothing is to be paid out of the *corpus*, but everything is to come out of the income. According to Hindu law, there can be no such thing as a remainder dependent upon a previous limitation. Perpetuities

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(1) 9 Moo. I. A., 123.

(2) 2 B. L. R., O. C., 11.

(3) 4 Id., 231.

(4) 8 Moo. I. A., 66.

(5) 4 Id., 137.

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are repugnant to Hindu law. As to trusts, the legal estate is a fiction of English law. There cannot be in Hindu law a legal, as contradistinguished from an equitable or beneficial, estate—*S. M. Krishnaaramani Dasi v. Ananda Krishna Bose* (1). A gift in trust for another is void as repugnant to Hindu law. This will is an audacious attempt to break through the Hindu law, and impose the technicalities of English law. The testator seeks to create what is equivalent to a trust for accumulation; see 1 Jarman on Wills (third edition), p. 254. Jatindra Mohan took no vested estate at the testator's death; he takes an uncertain interest, and therefore the like-estate is invalid. The cases cited by the Judges of the High Court were also commented on at length, and it was contended that the decree ought to be complete and final, and that *Lady Langdale v. Briggs* (2) was applicable.

Mr. *Cochrane*, in the absence of Sir R. Plumer, claimed the right of reply. Their Lordships, however, thought that Mr. Forsyth was entitled to reply, as in strictness they could only hear one Counsel; but as Mr. Cochrane desired to bring several other cases to their Lordships' notice, they permitted him to follow Mr. Forsyth.

Mr. *Forsyth* accordingly replied and commented upon the authorities cited by the other side.

Mr. *Cochrane* contended that there was no intestacy whatever either as to the personal or real estate; that the son had been disinherited, and there was no constructive trust for him; that the Court below fell into the mistake of supposing that a legacy after payment of debts was contingent or void on the ground of uncertainty; that the life-interest given in the personalty was followed up by a gift of the *corpus*, on the legacies and annuities being paid; that the Court below was misled by a loose *dictum* of Lord Hardwicke in *Bagshaw v. Spencer* (3); that the real estate was vested in the trustees for the benefit of the parties in the will, the plaintiff being clearly disinherited. He cited

(1) 4 B. L. R., O. C., 231.

(3) 1 Ves., 142.

(2) 8 De G. M. & G. 391.

Veerapermall Pillay v. Narrain Pillay (1), *Anonymous case* (2), *Manupunt Selukha v. Rindolal Pando* (3), *Hopkins v. Hopkins* (4), *Maundy v. Maundy* (5), *Challenger v. Sheppard* (6), *Knight v. Selby* (7), *Moore v. Oglehorn* (8), *Smith v. Smith* (9), *Hughes v. Evans* (10), and *Doe v. Garrod* (11).

Their Lordships reserved judgment in order to allow Surendra Mohan Tagore to be heard in the event of his electing to appear by Counsel at the bar. Of this, however, he did not avail himself.

WILLES, J., now delivered the judgment of their Lordships as follows :—

These were consolidated cross-appeals from a decree of the High Court of Judicature in Bengal (appellate side), disposing of numerous questions touching the right of succession to valuable property, partly ancestral and partly acquired, of the late Hon'ble Prasanna Kumar Tagore, a Hindu inhabitant of Calcutta, who died on the 30th of August 1868, leaving his only son, the plaintiff, and two widow daughters, with six grandchildren, the children of daughters, him surviving.

The defendants are three of the trustees and executors under the will of Prasanna Kumar, dated the 10th of October 1862, together with the persons in existence who claim a beneficial interest under the will, other than legacies and annuities (which are not disputed). The trustees and executors are Upendra Mohan Tagore, Jatindra Mohan Tagore, and Durga Prasad Mookerjee. Jatindra Mohan Tagore is named as the first tenant for life, and he had, and has, no son. The defendant Surendra Mohan Tagore (named in the will Surendra Mohan Tagore) is also named as tenant for life. The defendant Promoth Kumar Tagore (a minor) is the son of Surendra Mohan Tagore, and was born in the lifetime of the testator. He is described as tenant for life. The remaining defendant, Suttendra Mohan Tagore (a minor), is the grandson of Lalit Mohan Tagore, who was dead at the

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(1) 1 Notes of Mad. Cas., 78.

(2) East's Notes, 2 Morl., 10.

(3) 1 Sel. Rep., 324.

(4) 1 Atk., 580.

(5) 2 Str., 1020.

(6) 8 T. R., 597.

(7) 3 M. & G., 92.

(8) 12 Jur., 591.

(9) 2 Jur., N. S., 967.

(10) 13 Sim., 406.

(11) 2 B. & Ad., 87.

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date of the will. He was born in the lifetime of the testator. His father and grandfather died before the testator. If the will be valid, he is entitled to an estate in tail male. It does not appear that any other person beneficially interested is in existence. The fourth trustee has not acted, though he does not appear to have renounced. No question as to parties has been raised, except as to the alleged want of any description of the capacity in which Jatindra Mohan Tagore has been sued. This latter point was not argued before their Lordships, and they see no reason for doubting that the High Court rightly overruled it.

The will provided for the testator's daughters and grandchildren, but made no provision for the plaintiff, stating that he had been already provided for in the testator's lifetime. That provision was made by nuptial gift on the occasion of the plaintiff's marriage in the year 1848, when there was settled upon him absolutely, by his father, a *semiadari*, which then fetched Rs. 7,000 per annum, and the present value of which the plaintiff does not state. Upon the death of the plaintiff's first wife, his father also paid him the value of her jewels, to which he laid claim. The explanation of the exclusion of the plaintiff from any further provision by this will is supplied by the fact that he had become a Christian in the year 1851. No proceedings of exclusion or degradation had, however, followed or been attempted. Nor does any such question arise as was discussed in *Abraham v. Abraham* (1) as to the law applicable to the convert's own property, or as to the personal relations of him and his family. The Act XXI of 1850 appears to their Lordships to be conclusive to show that this change of religion does not affect the plaintiff's right of inheritance or suit.

As the present litigation turns upon the validity of the will, it will be convenient to state its effect, citing in terms those parts of it which call for interpretation. It was in the English language.

After reciting that the testator had acquired in severalty large estates, both real and personal, partly ancestral, but for

(1) 9 Moo. I. A., 195.

the most part by his personal industry, and that the testator had already made such provision for his son Ganendra Mohan Tagore (the plaintiff) as he considered sufficient, and that Ganendra Mohan Tagore would "take nothing whatever under the will," it purports to give all the testator's property to four trustees, of whom Jatindra Mohan Tagore was one, "their heirs, executors, administrators, representatives, and assigns," upon trust.

As to the personalty (except jewels, &c., in the personal use of members of his family, and such jewels, &c., as "the person or persons for the time being beneficially interested in the real estate or income, or surplus income thereof, shall wish to retain for his and their own use"), to pay funeral expenses, debts, and ordinary legacies within a year after his death, and to sell and to convert the rest into money and securities, and invest the proceeds in the name of the trustees, with power to change the securities:

To pay annuities afterwards given (except Rs. 1,000 a month afterwards given for worship) and legacies payable after the investment: and

"After payment of such annuities and legacies do and shall pay the surplus unexpended of the said interest, dividends, and annual proceeds unto the person or persons who for the time being shall, under the limitations and directions hereinafter contained and expressed, be entitled to the beneficial enjoyment of my real property, or of the rents and profits or surplus rents and profits thereof; and so soon as all of the said annuities and legacies shall have fallen in and been fully paid and satisfied, do and shall stand possessed of and interested in the said trust moneys, and securities, and the interest, dividends, and annual proceeds thereof, in trust absolutely, for the person or persons entitled, under the limitations and directions hereinafter contained and expressed to the beneficial or absolute enjoyment of my said real property."

And as to "realty or immoveable property," or of the nature of realty, "to apply the profits in aid of the income of the personalty in payment of debts, legacies, and annuities:"

To pay Rs. 1,000 a month for the worship of idols:

And the residue "to the person or persons" for the time being entitled to the beneficial enjoyment of the real estate under the subsequent directions of the will "for the absolute use of such person or persons respectively," and the will desires that the "trustees or trustee shall hold the said real estate gener-

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ally for the use and benefit of such last mentioned person or persons for the time being, so far as is consistent with the trusts and provisions" of the will; that, after payment of expenses of management, the person or persons for the time being entitled to the beneficial enjoyment of the real property, or of the income or surplus thereof, should receive Rs. 2,500 a month, and that the legacies and annuities should be paid gradually out of the balance, with interest at 5 per cent. The will then directs as follows:—

"And so soon as all the legacies, annuities (save and except the small sum of Rs. 1,000 for the worship of the said idols), given by this my will, shall have fallen in or been paid and fully satisfied, then on the trust forthwith to convey the said real estate and premises unto and to the use of the person who shall, under the limitations and directions herein contained, be entitled to the beneficial interest therein, with and subject to such and the like limitations, provisions, and directions as are hereinafter contained and expressed, of and concerning the said real estate, so far as the then conditions of circumstances will permit, and so far (but so far only) as such limitations or directions can be introduced into any deed of conveyance or settlement without infringing upon or violating any law against perpetuities which may then be in force, and apply to the said real estate or the conveyance or settlement of it as last aforesaid (if any such law there shall be)."

All the gifts, &c., in the will are declared to be subject to the bequest to the trustees, and to the provisions and declarations with reference thereto.

The will, then, after reciting that the testator's father had established certain idols at Mollajohur, and had given a talook to supply the means for their worship, and that such provision was insufficient, gives the Rs. 1,000, before mentioned, per month, for the purposes of the worship.

Provisions follow for the members of his family, other than the plaintiff, by annuities and legacies, to vest upon the testator's death. Then follow provisions for servants, for charities, and for founding the Tagore Law Professorship.

The will then disposes of the real property as follows:—

"And whereas I am, amongst other property, possessed of and entitled to a zemindari or talook called Perguana Patleedah, and Kiamat Patleedah, in Zilla Bungpore, subject to an annual consolidated jumma payable to Government of Rs. 40,555-12-3, and I am also possessed of and entitled to other estates and property in Zilla Bungpore and other districts, and also to a

ghaut, which I have erected and built on the river bank side of the Strand Road in Calcutta, and also to land and buildings opposite thereto, abutting on and near to the said road, and also to the baithak-khāna house, land and premises, where I usually reside, and also to various other parcels of real estate. And whereas the frequent division and sub-division of estates in Bengal is injurious alike to the families of zemindars and to the ryots, who are in consequence oppressed by numerous and needy landlords having conflicting interests, whence arise disputes and litigations. And whereas I have bestowed much time and money on the improvement of my estates and of the condition of the ryots and tenants thereof, and I am desirous that such improvements should continue to go on, and should not be interrupted by any division of the said estates or disputes concerning the same: Now, therefore, I give and devise (subject always to the devise to the said Ramanath Tagore, Upendra Mohan Tagore, Jatindra Mohan Tagore, and Durga Prasad Mookerjee hereinbefore contained) all the real property of what particular tenure, nature or kind soever, and also library, horses, carriages, farm-yard, furniture of the baithak-khāna, jewels, gold and silver plates, &c., which I shall, at the time of my death, be possessed of or entitled to, to and for the following uses, and subject to the following provisions and declarations, that is to say:—Unto and to the use of the said Jatindra Mohan Tagore for and during the term of his natural life; and from and after the determination of that estate, to the use of the eldest son of the said Jatindra Mohan Tagore, who shall be born during my life for the life of such eldest son; and after the determination of that estate, to the use of the first and other sons successively of the said eldest son of the said Jatindra Mohan Tagore, according to their respective seniorities, and the heirs male of their respective bodies issuing successively; and upon the failure or determination of that estate, to the use of the second and other sons of the said Jatindra Mohan Tagore, who shall be born during my life successively, according to their respective seniorities, for the life of each of such sons respectively; and upon the failure or determination of that estate, to the use of the first and other sons successively of such second or other sons of the said Jatindra Mohan Tagore and the heirs male of their respective bodies issuing, so that the elder of the sons of the said Jatindra Mohan Tagore born in my life-time, and his first and other sons successively, and the heirs male of their respective bodies issuing, may be preferred to and taken before the younger of the sons of the said Jatindra Mohan Tagore born in my life-time and his and their respective first and other sons successively, and the heirs male of their respective bodies issuing; and after the failure or determination of the uses and estates hereinbefore limited, to the use of each of the sons of the said Jatindra Mohan Tagore, who shall be born after my death successively, according to their respective seniorities, and the heirs male of their respective bodies issuing, so that the elder of such sons and the heirs male of his body may be preferred to and taken before the younger of such sons and the heirs male of their and his respective bodies issuing: and after the failure or

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determination of the uses and estates hereinbefore limited, then to the use of Surendra Mohan Tagore, the second son of my brother, Haro Kumar Tagore, for the term of his natural life ; and after the failure or determination of that estate,—”

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for Jatindra's ; and after the failure or determination of the said several estates and uses, to the first and other sons, and their sons, and the heirs male of their bodies, of Lalit Mohan Tagore successively, and respectively in like manner as in the case of the sons of Jatindra and Surendra. Like limitations as to other persons as to which no further question arises.

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Then follows a provision that adopted sons shall be deemed sons of the body within the will, but be postponed to actual issue of the body.

The will then contains a special provision for preserving strictly the character of the estates of inheritance which it proposes to create as follows :—

“ And I declare that, in the construction of this my will, sons by adoption shall always be deemed younger than and be postponed to sons who are the issue of the body of their father, and that the elder line shall always be preferred to the younger, and that every elder son of each heir in succession by descent, and, failing descent, by adoption, and his issue or heir male by descent, and, failing descent, by adoption, shall be preferred to every younger son and his issue or heir male by descent or adoption, to the exclusion of females and their descendants, and to the exclusion of all rights and claims for provision or maintenance of any person, male or female, out of the estate.”

It next provides that such estates of inheritance shall not be alienable as follows :—

“ And I declare my will and intention to be to settle and dispose of my estate in manner aforesaid as fully and completely as a Hindu born and resident in Bengal may give or control the inheritance of his estate, or a Hindu purchaser may regulate the conveyance or descent of property purchased or acquired by him, and not subject to any law or custom of England whereby an entail may be barred, affected, or destroyed.”

Then follows a proviso for cesser and limitation over of the estates, whether for life or inheritance, in case of any part of them being permitted by any holder “ to be sold for arrears of Government revenue,” or in case of failure “ to keep up in a due state of repair, and to use as his residence in Calcutta,” the

testator's house and furniture, &c. in which case the person next in succession is to take as in case of death.

There follows a power to improve and to make leases for twenty years without fine, and with power of re-entry.

The remainder of the will consists in directions to the trustees as to management, and a power of appointment of new trustees in case of death, refusal, or incapacity; and it appoints the trustees to be executors, and gives certain powers to "the acting executors or executor,"

There are two codicils. The first makes further provision for the children of a daughter. It speaks of the testator's "trustees or trustee." The second revokes that portion of the will which relates to worship and charity, which it states to have been otherwise provided for by the testator.

The plaintiff, after stating these facts, alleges that the trustees and executors have, against the directions in the will, improperly sold or disposed of a portion of the *corpus* of the personal estate, consisting of Company's Paper, and that there is danger of future waste.

The plaintiff prays in substance that it be declared

(1) that the plaintiff, as only son and heir-at-law, is entitled to represent the estate;

(2) that the testator had no absolute power of disposition, especially of ancestral estate;

(3) that the trusts as to the residue, after payment of the testamentary expenses, legacies, and annuities, are void, or at least void, save so far as they give Jatindra Mohan Tagore a life-interest, and that the plaintiff is entitled after Jatindra Mohan Tagore's death;

(4) that the plaintiff is entitled to an account of the property, and a declaration of the rights of the parties, and incidental relief by receiver, injunction, and otherwise for securing his interest, and an adequate maintenance, if he be not declared entitled to an immediate interest; and

(5) for further relief.

The answer of the trustees and executors, and that of Surendra Mohan Tagore, admit the main facts, with some qualifications not at present material; and that of the trustees and

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- executors denies that they have improperly disposed of the estate.
- They submit that the will is valid, and ask for proper declarations and directions.
- The infant defendants respectively pray that their rights, if any, may be protected by the Court.
- The following issues were settled by the High Court:—
- "First.—Does the plaint disclose any cause of action?"
- "Second.—Did the testator die intestate with respect to any and what portion of his estate?"
- "Third.—Was any and what part of the immoveable property of the testator ancestral estate, and, if so, had the testator power to dispose thereof by will?"
- "Fourth.—Are any and which of the gifts or limitations contained in the will and codicils of the testator void in law?"
- "Fifth.—What are the rights of the parties respectively under the will and codicils?"
- "Sixth.—Whether the plaintiff is entitled to any and what maintenance out of the estate of the said testator?"
- "Seventh.—Whether the executors, defendants, have misapplied any and what portion of the testator's estate?"

At this stage, the cause was heard before the High Court (ordinary original civil jurisdiction), and the learned Judge, Mr. Justice Phear, dismissed the plaint.

Upon appeal before the High Court (appellate jurisdiction), present Sir Barnes Peacock, C. J., and Mr. Justice Norman, it was decreed—

- (a) that the decree of the lower Court be reversed;
- (b) that the plaint in this suit does disclose a cause of action;
- (c) that Prasanna Kumar Tagore, the testator in the pleadings, did die intestate as to certain portions of his property;
- (d) that part of the immoveable property of the said testator was ancestral estate, and that he had a right to dispose thereof by will;
- (e) that the plaintiff is not entitled to any maintenance;
- (f) that the devises and gifts to Jatindra Mohan Tagore for life are valid, and that (subject to debts, legacies, and annuities) he is entitled during his life to the beneficial enjoyment of the real property, and that he is entitled until the

legacies and annuities shall fall in, and be satisfied, to receive the sum of Rs. 2,500 a month out of the net rents of the immoveable property, and also the surplus rents of the said immoveable property, and the unexpended surplus of the interests, dividends, and annual proceeds of the moveable property which shall, from time to time, remain unexpended;

(g) that the said Jatindra Mohan Tagore is entitled for life to use and enjoy the library, jewels, and other personal property directed to go with the real estate;

(h) that it is not necessary to come to any further finding upon the residue of the fourth issue, or to make any declaration of rights so far as they relate to the immoveable property, or to any portion of the rents thereof, or as to the surplus income of the personalty, so long as the debts, legacies, and annuities are unsatisfied;

(i) that the trust as to the personal estate, after the annuities and legacies given by the will shall have fallen in and been fully satisfied, is void and invalid, and that the beneficial interest in such personal estate is vested in the plaintiff, as the heir and representative of the said testator;

(k) that the executors and trustees are bound to render to the plaintiff an account;

(l) and after disposing of the costs, it was ordered and decreed;

(m) that the case be remanded to the lower Court, with a request that it will try the sixth (1) issue, and return its finding thereon, with the evidence, to the Appellate Court.

Thereupon appeals were preferred to Her Majesty in Council by the plaintiff, by Jatindra Mohan Tagore, and by Surendra, Mohan Tagore respectively, which have been consolidated, and the case was argued before this Board, when their Lordships adjourned the hearing in order to allow the defendant, Suttendra Mohan Tagore, who was not represented on the argument, the opportunity of being heard. Of that opportunity he has not availed himself, and the case is ripe for judgment.

The questions presented by this case must be dealt with and

(1) Intended for the seventh.

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decided according to the Hindu law prevailing in Bengal to which alone the property in question is subject. Little or no assistance can be derived from English rules or authorities touching the transfer of property, or the right of inheritance or succession thereto. Various complicated rules, which have been established in England, are wholly inapplicable to the Hindu system, in which property, whether moveable or immoveable, is, in general, subject to the same rule of gift or will, and to the same course of inheritance. The law of England, in the absence of custom, adopts the law of primogeniture as to inheritable freeholds, and a distribution among the nearest of kin as to personalty,—a distinction not known in Hindu law. The only trace of religion in the history of the law of succession in England is the trust (without any beneficial interest) formerly reposed in the Church to administer personal property—*Dyke v. Walford* (1). In the Hindu law of inheritance, on the contrary, the heir or heirs are selected who are most capable of exercising those religious rites which are considered to be beneficial to the deceased.

Whilst, however, rules of detail prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character, which have been strongly argued in this case, and as to which there is no precise authority. The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law. Inheritance does not depend upon the will of the individual owner: transfer does. Inheritance is a rule laid down (or, in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy—*Domat*, 2413. It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in *Soorjeemoney Dossee v. Denobundoo Mullick* (2):

(1) 5 Moo. P. C., 434.

(2) 6 Moo. I. A., 555.

—“ A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy.” Another general principle applicable to transfers by gift (more liberally applied in the law of England to wills than to gifts *inter vivos*) is that a benignant construction is to be used ; and that if the real meaning of the document can be reasonably ascertained from the language used, though that language be ungrammatical or untechnical, or mistaken as to name or description, or in any other manner incorrect, provided it sufficiently indicate what was meant, that meaning shall be enforced to the extent and in the form which the law allows. Accordingly, if the gift confers an estate upon a man with words imperfectly describing the kind of inheritance, but showing that it was intended that he should have an estate of inheritance, the language would be read as conferring an estate inheritable as the law directs. If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of law it does by will in England) an estate of inheritance. If there were added to such a gift an imperfect description of it as a gift of inheritance, not excluding the inheritance imposed by the law, an estate of inheritance would pass. If, again, the gift were in terms of an estate inheritable according to law, with superadded words, restricting the power of transfer which the law annexes to that estate, the restriction would be rejected, as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize. If, on the other hand, the gift were to a man and his heirs, to be selected from a line other than that specified by law, expressly excluding the legal course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew, and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime,—here, inas-much as an inheritance so described is not legal, such a gift can-

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not take effect, except in favor of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that state of inheritance which it confers is void.

It follows that all estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and that by Hindu law no person can succeed thereunder as heir to estates described in the terms which in English law would designate estates tail.

It remains, however, to be considered whether the persons described as heirs in tail, or heirs of inheritance not recognized by law, are sufficiently designated to take successively by way of gift that which the will incorrectly assumes to give them as heirs, so that they may be regarded as a succession of donees for life, having the power and subject to the restrictions sought to be imposed by the will upon the successive heirs in tail; or whether the language of the will is such as to show that the first taker was to have an estate of inheritance according to law, and that the words of special inheritance may be said to include such estate at least, and the residue be rejected as an attempt to impose fetters inconsistent with the law

This makes it necessary to consider the Hindu law of gifts during life and of wills, and the extent of the testator's power, whether in respect of the property he deals with, or the person upon whom he confers it. The law of gifts during life is of the simplest character. As to ancestral estate, it is said to be improper that it should be aliened by the holder without the concurrence of those who are interested in the succession; but by the law as prevailing in Bengal at least (1), the impropriety of the alienation does not affect the legal character of the act (*factum valet*), and it has long been recognized as law in Bengal that the legal power of transfer is the same as to all property, whether ances-

(1) As to Madras see to the same effect H. C. R., 326; S. C., 1 Norton, L. C., *Valinayagam Pillay v. Pachche*, 1 Mad. 334, per Willes, J.

tral or acquired. It applies to all persons in existence, and capable of taking from the donor, at the time when the gift is to take effect, so as to fall within the principle expressed in the *Dayabhaga*, ch. I, v. 21, by the phrase "relinquishment in favor of the donee who is a sentient person." By a rule now generally adopted in jurisprudence, this class would include children in embryo, who afterwards come into separate existence. As to the case of adopted children (so much relied upon during the argument), it is distinguishable because of the peculiar law applicable to that relation. The Hindu law recognizes an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death, from amongst those of his class, of one to stand in the place of a child actually begotten by the father. In contemplation of law, such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting, or otherwise taking from the testator, as if he had existed at the time of the testator's death having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence capable of taking at the time when the gift takes effect.

As to gifts by way of will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions, both here and in India, proceeding upon the assumption that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law. The introduction of gifts by will into general use has followed in India, as it has done in other countries, the conveyance of property *inter vivos*. The same may be said of the Roman law, as pointed out by Mr. E. C. Clark in his interesting treatise upon "Early Roman Law," p. 118, in which the testamentary power, apart from

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public sanction, appears to have been a development of the law of gifts *inter vivos*. Such a disposition of property, to take effect upon the death of the donor, though revocable in his lifetime, is, until revocation, a continuous act of gift up to the moment of death, and does then operate to give the property disposed of to the persons designated as beneficiaries. They take upon the death of the testator as they would if he had given the property to them in his lifetime. There is no law expressly and in terms applicable to persons who can so take. The law of wills has, however, grown up, so to speak, naturally, from a law which furnishes no analogy but that of gifts, and it is the duty of a tribunal dealing with a case new in the instance to be governed by the established principles and the analogies which have heretofore prevailed in like cases. The rule of jurisprudence in new cases was stated by Lord Wensleydale, in the opinion delivered by him as a Judge in the house of Lords in the case of *Mirhouse v. Rennel* (1), in accordance with principles generally recognized (2), "The case," said Lord Wensleydale, "is in some sense new, as many others are which continually occur, but we have no right to consider it, because it is new as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves according to our judgment of what is just and expedient. Our Common Law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents, and for the sake of attaining uniformity, consistency, and certainty, we must apply those rules, where they are not plainly unreasonable and inconvenient, to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them, in those to which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. It appears to us to be of great importance to keep

(1) 1 Cl. & Fin., 546.

(2) See this Wellstated in the introductory disposition of the Civil Code of Italy Article 3, "Qualora una controversia non si possa decidere con una precisa disposi-

zione di legge si avra riguardo alle disposizioni che regolano casi simili materie analoghe; ove il caso rimanga tutt avia dubbio, si decidera secondo i principii generali di diritto" — per Willies, J.

this principle steadily in view, not merely for the determination of this particular case, but for the interests of law as a science.¹ The analogous law in this case is to be found in that applicable to gifts, and even if wills were not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred.

The judgment delivered by the Lord Justice Knight Bruce, in the case of *S. M. Soorjeemoney Dossee v. Denobundoo Mullick* (1), was much relied upon to show that the English law as to executory devices ought to be applied in dealing with Hindu succession, and Mr. Justice Phear, upon the authority of that case, held that "there is nothing in Hindu law, to prevent a testator from making a gift of property to an unborn person, provided the gift is limited to take effect (to use the words of the Privy Council), if at all immediately on the close of a life in being." The expression in the judgment of the Lord Justice thus relied upon was as follows:—"We are to say whether there is any thing against public convenience, anything generally mischievous, or any thing against the general principles of Hindu law in allowing a testator to give property, whether by way of remainder, or by way of executory bequest (to borrow terms from the law of England), upon an event which is to happen, if at all, immediately on the close of a life in being. Their Lordships think that there is not, and that there would be great general inconvenience and public mischief in denying such a power, and that it is their duty to advise Her Majesty that such a power does exist." A consideration of the subject-matter to which these remarks were applied will, however, at once show that they were not intended to have the extensive effect attributed to them. The question was not as to the effect of a gift to a person not in existence, but whether a person in existence, and capable of taking under the will when it had effect, might become entitled upon a future contingency to receive an additional benefit. The testator devised an estate to several sons, with a proviso that, if either of such sons died without

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(1) 9 Mo. L. A., 134.

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having a son or son's son living at his death, neither his widow nor daughter should get his share, but that the same should go over to the other sons. Their Lordships held the gift over to be valid. The point in question, therefore, was not raised, and could not have been decided as supposed. Moreover, in the subsequent case of *Mussamut Bhoobun Moyee Debia v. Ram Kishore Acharj Chowdhry* (1), in which the testamentary power of disposition by Hindus in Bengal was fully recognized, it was distinctly laid down that the nature and extent of such power, so far as relates to contingent remainders and executory devises, is not to be regulated or governed by way of analogy to the law of England, which law applies to the wants of a state of society widely differing from that which prevails amongst Hindus in India. It is obvious, therefore, that the conclusion arrived at in the lower Court as to the result of the judgment in the former case was erroneous.

Their Lordships, for the reasons already stated, are of opinion that a person capable of taking under a will must be such a person as could take a gift *inter vivos*, and therefore must, either in fact or in contemplation of law, be in existence at the death of the testator.

Their Lordships, adopting and acting upon the clear general principal of Hindu law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriage or other family provision, for which authority may be found in Hindu law or usage.

These general preliminaries being laid down, it will be proper next to examine in detail the various questions raised upon the discussion of the particular will, in their natural order, first disposing of those which would appear equally to a gift as to a will, and next to those which affect the will in question.

It was argued on behalf of the plaintiff, in the first place, that the will is void by reason of its being founded upon the creation of an estate in trustees, absorbing the whole interests in the property, and out of which the interest of

(1) 10 Moo. I. A., 279.

the beneficiaries are to be fed. It was maintained that an estate, to be held in trust, can have no existence by the Hindu law, and that, as the foundation of the will fails, the whole superstructure must fall. This is hardly consistent with the admission in the plaint, and upon the argument that the legacies and annuities to be paid by the trustees, and which are equally founded upon the trust, are unassailable. The plaintiff, however, is not bound by an admission of a point of law, nor precluded from asserting the contrary, in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled. This argument for the plaintiff also gives the go-by to the consideration that if the trusts be void, they are not illegal, and that if they are struck out as void, the estates capable of being created by the will, and which the trusts were introduced to secure and maintain, would thereby become impressed directly upon the estate, subject to the charges for legacies and annuities which on all hands are admitted to be valid, as, for instance, upon a gift by a will to receive and pay A an annuity, and subject thereto in trust for B; if the trust be void, it should simply be struck out, and B would have the property subject to the annuity. Their Lordships are unable to give any effect to this argument against the admissibility of a trust. The anomalous law which has grown up in England of a legal estate which is paramount in one set of Courts, and an equitable ownership which is paramount in Courts of Equity, does not exist in, and ought not to be introduced into, Hindu law. But it is obvious that property, whether moveable or immovable, must, for many purposes, be vested, more or less absolutely, in some person or persons for the benefit of other persons, and trusts of various kinds have been recognized and acted on in India in many cases. Implied trusts were recognized and established here in the case of a *benami* purchase in *Gopeekrist Gosain v. Gungapersaud Gosain* (1); and in cases of a provision for charity or for other beneficent objects, such as the professorship provided for by the will under consideration, where no estate is con-

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ferred upon the beneficiaries, and their interest is in the proceeds of the property (to which no objection has been raised), the creation of a trust is practically necessary. If the intended effect of the argument upon this point was to bring distinctly under the notice of their Lordships the contention that, under the guise of an unnecessary trust of inheritance, the testator could not indirectly create beneficiary estates of a character unauthorized by law, and which could not directly be given without the intervention of the trust, their Lordships adopt that argument upon the ground that a man cannot be allowed to do by indirect means what is forbidden to be done directly, and that the trusts can only be sustained to the extent and for the purpose of giving effect to those beneficiary interests which the law recognizes, and that, after the determination of those interests, the beneficial interest in the residue of the property remains in the person who, but for the will, would lawfully be entitled thereto. Subject to this qualification, their Lordships are of opinion that the objections fail. As for the argument that the trust failed, because one of the trustees had renounced, or, more correctly speaking, had not acted, their Lordships think this criticism unfounded in law, and wholly inapplicable to the will in question, which distinctly provides for the case of a trustee not acting, and gives a directory power to fill up the number of trustees when required.

Having disposed of the question, whether there can be a trust estate, and shown that the distinction between "legal" and "equitable" represents only the accident of falling under diverse jurisdictions, and not the essential characteristic of a possession in one, for the convenience and benefit of another, the next subject for consideration involves the objections raised on behalf of the plaintiff to every beneficiary interest or estate created by the will, except the legacies and annuities. A summary of the provisions and limitations in the will, so far as they affect the parties to this suit, and limited for the present to the real estates and the personalty settled therewith, is as follows:—

Rs. 2,500 per month to the person or "persons for the time being entitled," under the will, "to the beneficial enjoyment of the said real property :"

The residue to go in aid of the income of the personal estate, which is to be first applied in payment of legacies and annuities which are to be paid "gradually and as may be found possible :"

And so soon as the legacies and annuities shall have fallen in or been satisfied, then the trustees or trustee are to convey to the person entitled to the beneficial interest, subject to the subsequent limitations, "so far as the terms and condition of circumstances will permit, and so far, but so far only, as such limitations" do not infringe any law then in force against perpetuities, "if any such law there shall be ;"

The limitation referred to was as follows in the present tense, and therefore to operate at the moment the will took effect, though "subject always to the devise to" the trustees :—

1. To the defendant Jatindra Mohan Tagore for life ;
2. To his eldest son, born during the testator's lifetime, for life ;

3. In strict settlement upon the first and other sons of such eldest son successively in tail male ;

4. Similar limitations for life and in tail male upon the other sons of Jatindra Mohan Tagore, born in the testator's lifetime, and their sons successively ;

5. Limitations in tail male upon the sons of Jatindra Mohan Tagore, born after the testator's death ;

6. "After the failure or determination of the uses and estates hereinbefore limited" to (the defendant) Surendra Mohan Tagore for life ;

7. Like limitations for the sons of Surendra Mohan Tagore and their sons as for the sons of Jatindra Mohan Tagore. Under these limitations the defendant, Promoth Kumar Tagore (1), who was alive at the death of the testator, is (if the will be valid) entitled for life, subject to the life-estates of Jatindra Mohan Tagore and of his father ;

8. Like limitations in favor of the sons of Lalit Mohan Tagore, who was deceased at the date of the will, and their sons in tail male, as for the sons of Jatindra Mohan Tagore. Under these limitations (if the will be valid), the defendant

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Suttendra Mohan Tagore, as the son of a son (his father having died during the testator's lifetime) would take an estate in tail male. He is the only defendant in that situation.

The will expressly and exclusively adopts primogeniture in the male line through males, preferring the eldest son, and excluding women and their descendants, and all right of provision or maintenance of either man or woman.

Then follows a statement showing that the testator desired to dispose of his estate "as fully and completely as a Hindu purchaser may regulate the conveyance or descent of property purchased or acquired by him," but "not subject to any law or custom of England whereby an entail may be barred." This clause shows an intention that each tenant, though of inheritance, should be prohibited from alienation, a restriction which in England could only be imposed by Act of Parliament, as in the case of the settled Abergavenny estates, and some others settled upon families ennobled and endowed for public services.

Then follow the residence clauses, by which the estate was to go over in case of non-residence, or allowing any part of the property to be sold for Government arrears, with powers to improve and to lease for twenty years.

A glance at this summary of the provisions of the will, with a due regard to the principles already laid down, shows that, upon the face of it, the will contains a variety of limitations which are void in law, as, for instance, the limitations in favor of persons unborn at the time of the death of the testator, and the limitations describing an inheritance in tail male, which is a novel mode of inheritance inconsistent with the Hindu law.

The first life-interest in Jatindra Mohan Tagore next requires attention. It was objected to on two grounds: first, because it was said that Hindu law recognises only one entire estate in the land, and does not allow of that estate being cut up into smaller distinct interests in the way of life-estate, reversion, remainder, and so forth; secondly, it was said that the life-interest was void, because of the contingency and uncertainty of the period at which it was to commence, because of the preference given to the legacies and annuities, and to their being

payable first out of the interest of the personalty, and then out of the rents of the realty, except the allowance of Rs. 2,500 per month, so that it is said this life-estate may never come into existence, because the legacies and annuities, and interest on arrears, may never be completely satisfied.

As for the first objection, it amounts to this, that, because there is, as was contended, only one estate technically known to Hindu law, and that an entirety, there can be no contract by which an owner of land may bind himself to allow to another the enjoyment of the usufruct of the land, to the exclusion of the owner, for a given time, whether for years or for life (because, in the law we are dealing with, the distinction of chattel and freehold has no existence), and to give exclusive right of possession for the enjoyment of that usufruct. It was admitted for the plaintiff that annuities given and charged upon land are valid; but if the annuity equalled or exceeded the profits, there would be an effectual gift of all the profits, and practically of the land, and yet it was contended that the possession and enjoyment of the land could not be directly given. Whether this interest and right of possession for years or life is called an estate or not, it as effectually excludes the general owner as an estate would. In the absence of any authority for so extraordinary a limitation of the right of property as would forbid a present parting with the exclusive possession and enjoyment for a time, their Lordships entertain no doubt that possession and enjoyment may be so dealt with, and that there is no objection to a similar interest being given by will.

As to the second objection to the life-interest,—namely, the uncertainty of the period at which it was to commence,—that objection also exhausts itself upon the enjoyment of the usufruct more or less. The life-interest was to begin at once. It was subject to the devise to trustees, who were to receive the rents, allow the life-holder Rs. 2,500 per month out of the net proceeds, to apply the remainder in aid of the interest of the personalty, to pay off the legacies and annuities, and, when they were discharged, to allow the life-holder, if he survived so long, or, if not, the succeeding donees in succession, to enjoy the whole. If the trust is not to be read to make estates valid which otherwise

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would be void, so neither is it to be read to defeat interests which without the trust would be valid. Their Lordships read this will, alike according to its words and substance, as giving a life-interest, subject to a charge for payment of legacies and annuities, whereby the rents over and above Rs. 2,500 per month, and the expense of maintenance, are to be applied in aid of another fund until the legacies and annuities are paid. The law of perpetuity has no application to such a state of things. There is not a single estate or interest in question which would not be valid within the English law of perpetuity, assuming that, upon the ground of public policy, such law ought to extend to India, which the character of the law of gifts there seems to render unnecessary.

Whether Jatindra Mohan Tagore took not merely an interest for life, but by construction of law an estate of inheritance, or whether such an estate of inheritance can be implied in favor of any of his successors, must next be considered. Upon this point it is unnecessary to repeat what has been already said as to the incompetency of an individual member of society to make a law, whereby a particular estate created by him shall descend in a novel line of inheritance, different from that prescribed by the law of the land. It is clear that an estate in tail male, such as that which the testator has attempted to create in each series of limitations, is not authorized by Hindu law. It could not exist with the terms of non-alienation attempted to be annexed to it, even in England. These would be rejected here as repugnant to a valid estate in tail male, created by sufficient words. The general intention to create a known estate of inheritance would be given effect to. The particular intention to deprive it of its legal incidents, would be disregarded as an attempt to legislate. Accordingly, it has been argued in support of the will that, as it shows an intention to give an estate of inheritance of some sort, all the machinery by which that estate was to be governed and dealt with after it was created ought to be rejected, and such an estate of inheritance, as the law would uphold and sanction, ought to be read out of the will, and conferred either upon Jatindra Mohan Tagore, whose family was intended, so long as it produced males descended of

males, to represent the estate described by the testator, by treating his life-estate as converted or extended into an estate of inheritance, according to Hindu law, or, at least upon his son to be begotten or adopted, as the first tenant in tail male; whereby the persons designated as heirs could take, though not in the fashion of the testator, at least somehow, and to some extent. In order, however, to arrive at this conclusion, we must find a general and prevailing intention of the testator, expressed by the words of his will, which will be advanced by this process; and we are not at liberty to invent for him a will which will have the effect of creating an estate at variance, not merely in details, but in substance and effect with what he has said.

The proposed construction would contradict the will in every particular expressed therein. It would give the father a right of inheritance and a power of disposition when the will says that he shall only hold for life. Testing this alone by English precedents, it might, in order to give effect to a general intent, be sustained by *Nicholl v. Nicholl* (1). The proposed construction would give the succession from him to all his sons equally, where the will says that the eldest shall be preferred and have a separate estate of inheritance, and that until that estate fails, the second and so forth shall not succeed. Testing this alone by English precedents, it might plausibly be maintained by *Pitt v. Jackson* (2). The proposed construction would give succession to women, whom the will excludes. It would let in rights of maintenance, which the will negatives. It would let in the power of alienation, which the will forbids. It would defeat the limitation in case of non-residence. It would disregard the provisions as to leasing and improvements which show, in common with the rest of the will, that the intention of the testator was to give, and to give only, such an inheritance as would keep together the property inalienable, so long as a male descended in a male line from any of the indicated sources of inheritance, should be in existence and should keep up state in the family mansion. There is no trace to be found in the will of an intention to create any other sort of estate.

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(1) 2 W. Bl., 1159.

(2) 2 Br. Ch. Ca. 51.

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and the will, as clearly as language can speak without express words, declares that it was not the intention of the testator that any person to take thereunder should have the estate of inheritance defined by the ordinary law. If the testator had used language to describe, however imperfectly or obscurely, such an estate as within his intention, effect ought to be given to that intention, when once arrived at, by a fair and liberal interpretation of his language. To create such an estate by judicial construction of this will would be something worse than guess-work as to what the testator might have said if he could be asked his meaning; for it would be to contradict in every article what he has intelligibly expressed. These observations dispose of the case of *Humberston v. Humberston* (1), so much relied upon by Sir Roundell Palmer in his able argument to sustain this claim to a general estate of inheritance by construction, and also of the other authorities which show that, in order to give effect to the general intention of the testator, estates of inheritance will be inferred against the particular expression, in order to benefit, as nearly as may be, in a lawful way all whom the testator intended to benefit. To infer a general estate of inheritance in this case would at the same time defeat the testator's general intention, and benefit persons other than those he intended to benefit against established principles of construction, and (again to refer for illustration to English law) against the authority of *Monypenny v. Dering* (2). Their Lordships are of opinion that no estate of inheritance, other than the void estate in tail male, can be read or deduced from the will.

There is, however, another point of view in which the estates in tail male may be regarded,—namely, as intended, at all events, to confer an estate for life upon the first taker in existence when the will took effect. The intention of the testator to give at least a life-estate to the first is clear, and if an estate in tail male stood first in the will, effect might perhaps be given to that intention. There was, however, no person in existence to take an estate in tail male at the testator's death, except Suttendra Mohan

(1) 1 P. Wms., 332.

(2) 2 De G. M. & G., 145.

Tagore and the validity of his claim to a life-interest in succession stands upon the same ground as that of Surendra Mohan Tagore and his son, whose position must next be discussed.

Upon this the question arises whether Surendra Mohan Tagore, Promoth Kumar Tagore, and Suttendra Mohan Tagore take life-interests successively after that of Jatindra Mohan Tagore, or whether the interests attempted to be created in them fail by reason of the avoidance and rejection of the previous estates with which they were linked, and upon the failure or determination of which they were to arise. This may be considered in reference to Surendra Mohan Tagore, as these other claimants in this respect stand upon a like footing. It may be urged that, as there was at the death of the testator no person to take under the first series of limitations, except Jatindra Mohan Tagore, and no person who came into existence afterwards could in point of law so take, there was in law a "failure" of the estates at the death of the testator, which no subsequent event could affect, and that the interest for life after the death of Jatindra Mohan Tagore then became vested in Surendra Mohan Tagore. The answer is that this argument proceeds under the assumption that "failure or determination" means failure or determination in law; as if the testator contemplated that his will might be void in law, which, as to the limitations in question, save as to the possible effect of a law against perpetuities, their Lordships see no sufficient ground upon the face of the will for supposing that he suspected. The true mode of construing a will is to consider it as expressing in all its parts, whether consistent with law or not, the intention of the testator, and to determine upon a reading of the whole will, whether, assuming the limitations therein mentioned to take effect, an interest claimed under it was intended under the circumstances to be conferred.

If Jatindra Mohan Tagore should beget or adopt a son and die, leaving the son and Surendra Mohan Tagore both surviving, either Surendra Mohan Tagore (and after him his son) must take at once and enjoy, to the exclusion of the son of Jatindra Mohan Tagore, in spite of the will, or the heir-at-law (who, though in terms excluded from benefit "under the will," cannot

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be excluded from his general right of inheritance without a valid devise to some other person) must enter and enjoy during the life of Jatindra's son, and of his issue male actual, or adopted; and Surendra Mohan Tagore (or his son), if he succeeded, must succeed, not as a link in the special chain of succession framed to keep together the family estate, but in turn with the heir-at-law, whose intervention was not contemplated by the testator.

If Jatindra Mohan Tagore were to die, leaving power to adopt a son, who was afterwards, in fact, adopted, Surendra Mohan Tagore would either enjoy absolutely, to the exclusion of the son, in spite of the will, or the heir-at-law would enter as before stated.

Many other cases might be supposed, in which the rights of Surendra Mohan and those who claim after him, instead of forming part of a series of estates in successive devisees to fulfil the testator's intention by keeping up the estate, and handing it on from one to another, whilst there was a male representative of the selected line of limitation and descent, would become a fitful and uncertain enjoyment in turns with the heir-at-law, according to whether there was or was not any person in existence who would, if by law he could, have been a prior taker under the will.

Their Lordships reject the conclusion either that the testator meant to give an uncertain interest of so strange and shifting a character, or that there was an intention to give an absolute estate to precede the prior estates, in the event not appearing to have been contemplated by the testator of the prior estates being void in law. Their Lordships understand "failure or determination" to mean failure or determination in fact, of an estate or estates which the testator considered sufficient in law, and that these limitations over were in the scheme of this will intended to follow the creation of the prior estates of inheritance, and must fall therewith.

Their Lordships are thus of opinion that a life-interest has been created in Jatindra Mohan Tagore, and that the estates of inheritance and subsequent estates or interests attempted to be created by the will have failed.

The decision of the rights in the real estate involves the personalty settled therewith, which calls for no further remark. There is, however, left the question how far the personalty not settled with the realty, but to be made into a distinct fund by the will after the legacies and annuities had been disposed of, ought to be dealt with. Whether the bequests of the *corpus* is void or whether the interest is to be enjoyed by the tenant for life so long as he can enjoy the realty.

The gift of the personalty, or rather of the fund in money and securities for money into which the personalty was to be converted after the falling in and satisfaction of the legacies and annuities, was held absolutely void in the High Court (appellate jurisdiction). The Chief Justice rejected the words "or persons" as insensible, because only persons could take the beneficial interest in the realty at the same time, and he treated the gift of the fund of money and securities for money as a gift of the *corpus* to an uncertain person who might be one of those who for failure of the estate in tail male, cannot take the realty. Mr. Justice Norman declined to reject the words "or persons," and he suggested amongst others the construction that the person then in possession and his successors should take the entire income and profits without deduction; but he leaned to the alternative, that it was uncertain whether the testator meant to make an absolute gift, or only to give the interest in succession *reddendo singula singulis*, and upon this ground he concurred in holding the gift to be void. The decree gives Jatendra Mohan Tagore the surplus of the interest remaining in the hands of the trustees after payment of the legacies and annuities, and excludes him and his successors from any right to the subsequently accruing interest, which is hardly consistent. The intention of the testator, however, appears sufficiently clear to give effect to all the words as follows,—*viz.*, that the surplus in the hands of the trustees, and the subsequently accruing interest of the personal fund, is to go in the same line and to the same "person or persons" as were in succession to take a beneficial interest in the realty, in the same manner as the rents of the realty. The words "or persons," instead of being rejected as inconsistent with a gift of the *corpus*, ought rather to be taken

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as conclusive to show that the intention was to benefit persons taking successively, rendering to each his share of the interest. The words "persons" in the singular is used in the clauses directing a conveyance of the real estate, although the conveyance was to be for the benefit of all the persons taking successively, because there was only one conveyance to be made for the benefit of all. The words "or persons" in the plural were proper in the clause directing the trustees, not to convey, but to stand "possessed of, and interested in, the trust moneys, and securities, and the interest, dividends, and the annual proceeds thereof in trust" absolutely for the person or persons entitled under the limitations, &c., to the beneficial or absolute enjoyment of the real property. And the use of the plural shows that one person was not to take all, but that several persons were to take and they could only take in succession under the limitations in the will. The words "absolutely" and "absolute" are used not to indicate that the whole was to go over together, but that it was to be enjoyed free from the charges in respect of legacies and annuities. No person could be entitled to the "absolute" enjoyment of the real property under the will in the largest sense, and "absolute" is classed by the will with "beneficial," so as to have a distinct meaning as applied to each holder, whether for life or in tail male. The result, in their Lordships' opinion, is that, after the legacies and annuities fall in and are satisfied, the intention was to establish a trust of a fund, consisting of money and securities, the interest of which should be paid to the person or persons for the time being successively entitled to the rents of the real estate, the *corpus* remaining otherwise undisposed of.

In this respect the decree ought, in the opinion of their Lordships, to be varied, and a declaration made of the right of Jatindra Mohan Tagore, not only to surplus interest of the personalty until legacies and annuities fall in and are satisfied, but also to the interest of the personalty after such falling in or satisfaction.

As to the plaintiff's claim to maintenance, their Lordships adopt the conclusion arrived at in the High Court. Without entering into the general question as to how far the testament-

any power as to ancestral property can supersede the claim to maintenance, it is enough to say that the claim in this case must be sustained, if at all, upon the footing that the marriage gift ought to be rejected. The plaintiff admits a marriage gift by his father of real property, producing at the time Rs. 7,000 per year, which, *prima facie*, is an adequate maintenance. He does not state the present income. His averment of its insufficiency is not that it is in fact unreasonable or inadequate, but only that it is insufficient "considering the amount and value of the said Prasanna Kumar Tagore's property." The amount of the property, doubtless, is an element in determining the sufficiency of a maintenance, but it cannot be regarded as the criterion. Other circumstances, and even the position or conduct of the claimant (speaking generally, and not of the particular claimant) may reduce the maintenance. If the plaint were considered well founded in this respect, a son not provided for might compel a frugal father, who had acquired large means by his own exertions, to allow a larger maintenance than he himself was satisfied to live upon, and then children living as part of his family must be content with. The only question raised, therefore, is, whether the obligation, moral or legal, of the father to provide a reasonable maintenance for his son, is satisfied by a marriage gift of a *prima facie* adequate income; and their Lordships are of opinion that such a gift is in its character obviously a provision for maintenance which in this case must be regarded as sufficient, and in respect of which the plaintiff has laid no foundation for further inquiry, either in law or fact.

The plaintiff's claim to an account must next be considered. He takes nothing under the will. As heir-at-law he is entitled to so much of the inheritance in the real and personal property as is not exhausted by the valid provisions of the will, and he is entitled to the protection of the law to keep that inheritance intact, until he comes into its enjoyment. He has averred upon information and belief that the trustees, "against the directions contained in the will," sold securities for money consisting of Government Paper, "out of the *corpus* of the estate of the said testator, and have improperly applied the proceeds thereof."

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Issue was taken by the trustees upon this averment. In the High Court (original ordinary civil jurisdiction), Mr. Justice Phear considered this statement of the plaintiff insufficient, because "the trustees and executors are distinctly empowered by the will to pay debts and legacies out of the personalty and the selling of the Government Paper, of which the plaintiff complains may, as far as anything goes which is stated by the plaintiff, have been effected for that purpose." The High Court (appellate jurisdiction) however directed an account, thinking that an averment upon "information and belief" was sufficient as to a fact within the defendants' knowledge, and not within the plaintiff's, and that the statement as to the sale being "against the directions contained in the will," and of the proceeds being "improperly applied," was consistent with a due performance of the trust. In this latter view their Lordships concur and hold that the plaintiff is entitled to the account decreed. Whether any further relief should follow must be decreed by the High Court upon the result of the account when taken.

Upon the question whether or not there ought to be made a declaration, beyond a mere expression of opinion, as to the rights of the parties after life-interest of Jatindra Mohan Tagore, their Lordships are of opinion that such a declaration ought to be made. This case is distinguishable from *Lady Langdale v. Briggs* (1), where it was laid down that, generally speaking, it is not according to the course of the Courts in England to declare future rights, and it falls within the exceptions there contemplated as possible, in the judgment of the Lord Justice Turner, page 428; because all the existing parties interested are in Court, and it is impossible to decide the case without considering the whole scope of the will, and arriving at judicial conclusions as to the rights of each of the parties thereunder, which judicial conclusions, so far as they dispose, or may dispose of the rights of those parties, ought to be incorporated in the decree.

As to costs, considering that the important questions litigated have arisen from the novelty and difficulty of the will, their Lordships are of opinion that the costs as between attorney and

(1) 8 De. G. M. & G., 391.

client of all parties in the lower Court, upon appeal to the High Court (appellate jurisdiction), and of the appeals to Her Majesty in Council, ought to be paid out of the estate, taking first the corpus of the personal or moveable estate, and that future costs ought to be reserved until the taking of the account, and be then disposed of by the High Court.

Their Lordships will therefore humbly recommend to Her Majesty that the decree of the High Court (appellate jurisdiction) be in part affirmed, and in part varied, and that additional declarations of the rights of the parties should be made as follows, that is to say:—that the said decree be affirmed, so far as it orders that the decree of the lower Court in its ordinary civil jurisdiction be reversed: and that the plaintiff in this suit does show a cause of action: and that the testator died intestate as to certain portions of his property: and that part of the testator's immoveable property was ancestral estate, and that he had a right to dispose thereof by will: and that the plaintiff is not entitled to any maintenance from the estate of the testator; and that the plaintiff is entitled to an account as directed by the decree of the High Court (appellate jurisdiction): and that, as to the residue of the said decree that the same be varied, and the following order and decree substituted for the same, that is to say:—that the defendant Jatindra Mohan Tagore is beneficially entitled to a life interest under the said will in the real or immoveable property, and also in the personal or moveable property vested in the trustees therein mentioned, and directed to be conveyed or converted into a fund respectively, subject to the payments therein directed to be made, and to the provisions of the will not hereby declared to be void; and also, until the legacies and annuities fall in and are satisfied, to receive Rs. 2,500 per month out of the net rents of the real or immoveable property, and also the surplus rents of the same and the unexpended surplus of the interest, dividends, and annual profits of the personal or moveable property which from time to time remain unexpended after the payments by the will directed to be made thereout; and also that, subject to the trusts for payment of the legacies and annuities, the said Jatindra Mohan Tagore is beneficially entitled for his life to use and enjoy the library,

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carriages, horses, farm-yard, furniture, jewels, gold and silver plates, and other articles belonging to the said testator, except the jewels, household furniture, and other articles which, at the time of the testator's death, was or were in the personal use of any member of the testator's family, which by the will are not, or were not, to be collected, or got in, or sold by the said trustees and executors: and that the limitations in tail male and subsequent limitations in the said will respectively have failed and are void: and that, upon the failure or determination of the life-interest of the said Jatindra Mohan Tagore, the plaintiff, subject to the provisions in the said will not hereby declared to be void, is entitled, as heir-at-law of the said testator, to the real and personal property in respect of the receipt and enjoyment of which the said life-interest is declared; and that upon the expiration of the said life-interests, and subject to any trust not hereby declared void, the beneficial interest in the said real and personal property is vested in the plaintiff as such heir-at-law: and that the case be remitted to the Lower Court, with a direction that it shall try the seventh (1) issue, and return its finding thereon, with the evidence, to the High Court (appellate jurisdiction): and that the costs of the parties respectively in the lower Court, of the appeal to the High Court (appellate jurisdiction), and the costs of the several appeals to Her Majesty in Council, be taxed as between attorney and client, and paid out of the estate, taking first the *corpus* of the personal or moveable property, and that the future costs, if any, be reserved and disposed of by the High Court (appellate jurisdiction) upon the taking of the account by that Court directed.

Decree modified.

Agent for Jatindra Mohan Tagore and Surendra Mohan Tagore: Mr. Mortimer.

Agent for Ganendra Mohan Tagore: Messrs. J. S. and A. P. Judge.

(1) In the decree, as printed, erroneously called the sixth issue.

[APPELLATE CRIMINAL.]

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

ANGELO AND ANOTHER (DEFENDANTS) v. CARGILL AND ANOTHER
(COMPLAINANTS).*

Throughfare—Public Place—Nuisance—Obstruction—Magistrate—Jurisdiction—Criminal Procedure Code (Act XXV of 1861), ss. 308, 404, 434—Right to begin.

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Where, in a proceeding before a Magistrate under s. 308 of the Code of Criminal Procedure, for the removal of an obstruction from a throughfare or public place, the accused appears and shows cause, it is the duty of the Magistrate to enquire whether there is a throughfare or public place, and whether there is an obstruction. If the Magistrate makes enquiry upon evidence before him, he does not act without jurisdiction, or in excess of jurisdiction. The High Court cannot set aside his order except for an error in law, or an excess of jurisdiction. It is not a ground for interference that the Magistrate has come to an erroneous decision upon the evidence.

THIS was a reference by the Sessions Judge of the 24-Pergunnas, under s. 434 of the Code of Criminal Procedure, of an order of the Joint Magistrate made under s. 308 (1) for the removal of certain obstructions from a throughfare.

(1) S. 308.—“Whenever the Magistrate of a district or of a division of a district may consider that any unlawful obstruction or nuisance should be removed from any throughfare or public place, or that any trade or occupation, by reason of its being injurious to the health or comfort of the community, should be suppressed, or should be removed to a different place, or that the construction of any building or the disposal of any combustible substance, as likely to occasion conflagration, should be prevented, or that any building is in such a state of weakness that it is likely to fall, and thereby cause injury to persons passing by, and that its removal in consequence is necessary, or that any tank or well adjacent to any public throughfare should be fenced in such a manner

as to prevent danger arising to the public, he may issue an order to the person causing such obstruction or nuisance, or carrying on such trade or occupation, or being the owner or in possession of, or having control over, such building, substance, tank, or well as aforesaid, calling on such person, within a time to be fixed in the order, to remove such obstruction or nuisance, or to suppress or remove such trade or occupation, or to stop the construction of, or to remove such building, or to alter the disposal of such substance, or to fence such tank or well (as the case may be), or to appear before such Magistrate within the time mentioned in the order, and show cause why such order should not be enforced.”

* Reference to the High Court, under s. 434 of the Code of Criminal Procedure by the Sessions Judge of the 24-Pergunnas.

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The complaint, which was instituted on the 26th April 1872, in the Court of the Deputy Magistrate in charge of the Sealdah Sub-division, was that Messrs. Angelo Brothers had laid down a tramway in a public place or thoroughfare at Cossipore, and had thereby caused common injury, annoyance, and danger to the public or people in general who dwell, or occupied property, in the vicinity.

On the 6th May 1872, the police forwarded a report and a map of the locality. An order was directed to be issued upon the defendants to remove the obstruction within three days, or to appear and show cause why they should not do so. The defendants appeared within three days to show cause. The case was then removed to the Court of the Joint Magistrate of the 24-Pergunnas on the 14th May 1872, at the instance of the defendants. The defendants denied that the land was public land; they claimed it as their own property under a *maurusi Pattā* from the zemindar.

The Joint Magistrate visited the spot, and, after receiving the evidence offered by both sides, came to the conclusion that the lane in which the tramway had been laid was a public thoroughfare, and, on the 4th June, ordered that the defendants should remove the obstruction within four days under pain of prosecution under s. 188 of the Indian Penal Code.

The Sessions Judge of the 24-Pergunnas, at the instance of the defendants, made a reference to the High Court, expressing his opinion that the Joint Magistrate's proceedings in the case should be quashed as illegal, and made in excess of jurisdiction. He considered that the evidence showed that the lane was not a thoroughfare, and that the fact of Messrs. Angelo holding a *maurusi pattā* of the land barred the Magistrate's interference under s. 308, and raised a question which the Civil Court alone could decide.

Mr. Lowe (with him Mr. Trotman) in support of the order of the Magistrate.

The Advocate-General (offg.) contra.

Couch, C. J.—Is there any practice in this Court in references under s. 484, when Counsel appear, as to which side should begin? (1).

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The Advocate-General.—So far as I know, the practice is not settled. I believe it is usual to lay the reference before the Court; the Court reads it, and if it thinks proper, it quashes the order of the Magistrate at once; but if there be any matter upon which the Court requires information, or if it thinks that the matter is arguable, Counsel are allowed to address the Court. I believe Counsel are not heard as a matter of right, but of indulgence.

Couch, C. J.—That is so. Counsel do not appear as of right. The reference from the Judge impeaches the order of the Magistrate. I think we should give some effect to the opinion of the Judge, and call upon Mr. Lowe to support the order.

Mr. Lowe contended that the Magistrate's order was in accordance with the law, and that his estimate of the evidence was quite correct. Where the defendants, in showing cause, claim any right in the land which is said to be a thoroughfare, the Magistrate must enquire whether they have such right or not; otherwise a man, by claiming a right of property, even in a public road, might stop the action of the Criminal Courts, and continue the nuisance. Where, as in this case, the public generally and the villagers pass over a way as of right, using it continuously without interruption for many years, that way is a public thoroughfare. The evidence, both oral and documentary, showed that the lane was a public road thirty years ago. The Magistrate's conclusion from the evidence is correct; but supposing it is not, it does not constitute such an error in law, or an acting in excess of jurisdiction, as would enable this Court to set it aside under the provisions of s. 404 of the Code of Criminal Procedure, or under its general power of supervision—*Queen v. Ala Baksh* (2).

(1) See s. 297, Act X of 1872.

(2) 7 B. L. E., 482, in note.

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The *Advocate-General*.—The Judge's view is correct, that, where the land is claimed as private property, as in this case, it is for the Civil Court to decide whether the claim is groundless or not. It could not be the intention of the Legislature to leave it to the Magistrate to determine the title to property. The defendants here have put forward, not an imaginary, but a substantial claim, and have filed the deed, a *maurad pattd*, under which they claim the land as their own property. Under these circumstances, is it proper for a Magistrate to try, first, to whom the land belongs, and then to order the removal of a nuisance at the instance of a private individual or of a private firm? S. 308 only says that, whenever the Magistrate "may consider that any unlawful obstruction or nuisance should be removed from any thoroughfare or public place," &c. The language of this section clearly indicates that the place must be indisputably a public place, and not private property. If this were a public place, it would be under the care of the Suburban Municipality; but no claim is made here on their behalf.

It may be a question too whether, supposing the lane to be a public road, the rails that have been put down are a nuisance and obstruction within the meaning of the law. The obstruction is certainly not one that would prevent either men or horses from using the road for the purposes for which they have, according to the evidence, been hitherto used.

Mr. *Lowe* in reply.

The judgment of the Court was delivered by

COUCH, C. J.—In this case, which was referred to this Court under s. 434 of the Code of Criminal Procedure by the Judge of the 24-Pergunnas, the Magistrate had proceeded under s. 308 of the Code of Criminal Procedure, and had made an order which the Sessions Judge says he is of opinion was in excess of his jurisdiction, and ought to be quashed. S. 308 gives power to the Magistrate, whenever he considers that there is any unlawful obstruction or nuisance which should be removed from

anythoroughfare, to make an order calling upon the person causing the obstruction or nuisance to remove it, or to show cause to the contrary. In this case, cause was shown by the persons upon whom the order was made, Messrs. Angelo Brothers, and the Magistrate entered upon the enquiry. Now, when cause is shown, it is the duty of the Magistrate to, and he must, enquire whether there is a thoroughfare within the meaning of the section, and whether there is an obstruction. It cannot be said that, in entering upon that inquiry, he is not acting within his jurisdiction. If, in the course of the enquiry, he decides any point of law erroneously, the case may be taken up by this Court under s. 404 of the Code of Criminal Procedure; but if there is evidence before him, and he decides upon it, although his decision upon the evidence may be an erroneous one, yet if there is no error in law, the case does not come within s. 404: nor is an erroneous decision upon the evidence an excess of jurisdiction which would enable this Court to interfere under its general power of superintendence.

With reference to what is an excess of jurisdiction in cases of this kind, or a want of jurisdiction, the language of Lord Denman, in a leading case upon questions of this description, may be usefully quoted. It is in the case of *The Queen v. Bolton* (1). There an order had been made by Magistrates under an Act of Parliament, which gave power to them in certain cases to make orders for giving up possession of land to the church-wardens and overseers of a parish, and the case being brought before the Court of Queen's Bench by a *certiorari*, Lord Denman, in his judgment, having stated that there were two points made, first, that the proceedings all being regular upon the face of them, and disclosing a case within the jurisdiction of the Magistrates, the Court could not look at affidavits for the purpose of impeaching their decision; and the second that, even if the affidavits were looked at, the case would be found to be one of conflicting evidence in which there was much to support the conclusion to which the Magistrates had come, says:—"The first of these is a point of much importance, because of very general

(1) 1 Q. B., 66.

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application ; but the principle on which it turns is very simple : the difficulty is always found in applying it. The case to be supposed is one like the present, in which the Legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the Magistrates below ; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do, when their decision is complained of, is to see that the case was one within their jurisdiction, and that their proceedings on the face of them are regular and according to law. Even if their decision should upon the merits be ~~unwise~~ or unjust, on these grounds we cannot reverse it." And then, in the subsequent paragraph, with regard to the objection of want of jurisdiction, he says :—" But where a charge has been well laid before a Magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the enquiry : in so doing he undoubtedly acts within his jurisdiction : but in the course of the enquiry, evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn, may be that the offence has not been committed, and so, that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of showing this is clearly in effect to show that the Magistrate's decision was wrong ; if he affirms the charge, and not to show that he acted without jurisdiction : for they would admit that, in every stage of the enquiry up to the conclusion, he could not but have proceeded, and that if he had come to a different conclusion, his judgment of acquittal would have been a binding judgment, and barred another proceeding for the same offence. Upon principle, therefore, affidavits cannot be received under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature ; it is determinable on the commencement, not at the conclusion, of the enquiry : and affidavits, to be receivable, must be directed to what appears at the former stage, and not to the facts disclosed in the progress of the enquiry."

Here, if the Magistrate has come to a wrong conclusion upon the evidence, it does not affect his jurisdiction. He had jurisdiction to enquire, and if there was, as, in this case, evidence before

him, he cannot be said to have exceeded his jurisdiction, although his conclusion may not be the conclusion that ought, in the opinion of the Sessions Judge, or of us, to be drawn from the evidence. The Magistrate had to decide whether there was a thoroughfare, and whether there was an obstruction: it was not necessary to determine what is meant by thoroughfare, whether a public way along which all persons have a right to pass and re-pass, or a way along which only some persons have a right to pass and re-pass. In either case, there was evidence upon which the Magistrate might find that there was a thoroughfare. There was evidence, especially what Mr. Lowe referred to, viz., the statements of the parties themselves, that it was a public thoroughfare, and there certainly was abundant evidence that it was a way which was used by a considerable number of persons. The Magistrate, therefore, had evidence before him; and there has not been in this case, either an erroneous decision upon a point of law, or an acting without jurisdiction or in excess of jurisdiction. The proceedings must be returned: the Court makes no order under s. 404.

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[APPELLATE CIVIL.]

Before Mr. Justice Markby.

ANANDA CHANDRA BOSE (ONE OF THE DEFENDANTS) v.

L. P. D. BROUGHTON (PLAINTIFF).*

1872

August 24.

*Appeal to Privy Council—Subject-matter in Suit under appealable Value—**Decision to govern other Suits.—Practice—Leave to appeal.*

Leave to appeal to the Privy Council granted where the appeal, though valued at less than Rs. 10,000, involved indirectly questions respecting property of the value of Rs. 10,000, inasmuch as the judgment of the High Court would govern the decision in other suits which the plaintiff intended to bring on precisely the same grounds, and in respect of which precisely the same questions would arise as had arisen in the suit sought to be appealed.

THE plaintiff, being possessed of certain property as Administrator-General, brought a suit to set aside a *patta* granted to the defendant by a former manager of the estate, and ratified

* Privy Council: In the matter of Special Appeal No 1016 of 1871.

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by his successor, on the ground that it had been so granted and ratified without authority. The decree of the Court of first instance, which had dismissed the plaintiff's suit, was reversed by the lower Appellate Court, but affirmed on appeal by the High Court (Couch, C.J., and Mitter, J.) The plaintiff thereupon petitioned for leave to appeal to the Privy Council from the judgment and decree of the High Court. He stated in his petition that the appeal, though valued at only Rs. 1,540-4-8, involved claims and questions respecting property of an aggregate value of not less than Rs. 10,000, inasmuch as the judgment of the High Court would govern the decision in various other suits which he was about to bring against the defendant, in order to set aside other *pattas* similar to the one in suit, and similarly obtained by the defendant. The petition was supported by an affidavit to the same effect of the then manager of the estate.

The defendant, in an affidavit filed in answer to a rule to show cause why the requisite certificate should not be granted to the plaintiff, opposed the application on the ground that no other law-suit was then existing between him and the plaintiff respecting any other portion of the property similar to this one in which the application was made; that the other land held by him was so held under different titles, obtained on different occasions, under distinct circumstances, and from various managers, each of which titles must, in the event of future litigation with regard thereto, depend upon its own merits; and that the leases granted by the different managers did not altogether amount in value to Rs. 10,000. In three schedules appended to his petition, he set out the alleged value of the various leases.

Baboo *Nilmadhab Bose* showed cause. He contended that the facts stated in the defendant's affidavit showed that the case was not one in which leave to appeal should be granted.

Mr. *Woodroffe* in support of the rule referred to the case of *Ko Khine v. Snadden* (1), in which the Privy Council

(1) 1 Burma L. R., 1.

granted leave to appeal, although the amount involved in the action was under the appealable value, there being an important question of law raised, and eleven other actions brought involving the same question of law, and which had been directed by an order of the Court below to be heard upon the same evidence, and concluded by the same judgment, and the aggregate amount involved in the actions being more than the appealable value.

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MARKET, J.—It seems to me that the result of the affidavit is this, that it is clear that there are in addition to the *pattā*, which was the subject of appeal to this Court, five other *pattās* standing precisely on the same grounds, and in respect of which precisely the same questions arise as have arisen in the suit which has already come up to this Court; and I do not think there can be any doubt, therefore, that the judgment of this Court did involve directly or indirectly a question respecting property of the value of the aggregate value of the whole of the property comprised in these six *pattās*.

I do not think there is any ground for either of the contentions put forward by the opposite party, either that it is necessary under the Charter that suits, in respect of these other *pattās*, shall actually have been commenced, or that this question must be governed by the Rules of 1838, and not by the existing Charter. The question therefore which I have to consider is whether the aggregate value of the properties comprised in these six *pattās* does amount to Rs. 10,000, as it has been positively affirmed in the affidavit on the part of the petitioner that it does. The opposite party has set out in schedule A in his affidavit the extent of the properties, and what he states to be their value. Now, I do not think it will be a desirable course in this case to have any further affidavits in the matter; if I had any doubt, I should have been more inclined to direct an enquiry if I could possibly do so through some officer in the *mofussil*. But upon these contradictory affidavits, I find that the property is of the value of Rs. 10,000. The property which is actually involved in the suit which has come up to this Court is as shown by the schedule of the value of Rs. 21 per *bighā*;

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the remaining property is stated to be of the average value of something between Rs. 5 and 6 per *bigha*; either of these sums is extremely low for the valuation of a perpetual interest in the land, and no explanation whatever is given—although all these *pattas* were granted about the same time for lands situated in the same district—why this extraordinary difference should exist. I think that, in the absence of any satisfactory explanation for this difference, credit ought to be given to the allegations made by the petitioner in his affidavit that the property is of the value of Rs. 10,000. I do not think, therefore, that it is necessary to make a further enquiry. I think upon this evidence I ought to admit the appeal.

The rule is made absolute, and a certificate should be granted that the judgment of this Court did involve indirectly a question respecting property of the value of Rs. 10,000.

Leave granted.

Attorneys for the respondent: Messrs. *Berners, Sanderson, and Upton.*

[PRIVY COUNCIL.]

* P. C.
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GANGAPRASAD (ONE OF THE PLAINTIFFS) v. MAWJI
LAL AND MUSSAMAT LAKHU (DEPENDANTS).

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

Bond—Evidence—Non-registration.

In an action on a bond and mortgage, which was not registered, and the factum of which was denied, the Principal Sudder Ameen decided in favor of the plaintiffs; but such judgment being reversed by the High Court, the Judicial Committee considering that too much weight had been given to the fact of non-registration, reversed that finding, and, after a careful analysis of the evidence, found the bond to be genuine.

This was an appeal from a decision of the High Court (Seton-Karr and Macpherson, JJ.), dated 11th May 1866.

* *Present*:—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR JOSEPH NAPIER, LORD JUSTICE JAMES, LORD JUSTICE MELLISH. AND SIR LAWRENCE PEARL.

The appellant and one Madhusudan Lal sued the respondent, Mawji Lal, to recover the amount of a mortgage and of a bond given at the same time, and to set aside as fraudulent a deed executed by him in favor of his wife.

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It appeared that the plaintiffs had had dealings with a firm carried on by two sons of the defendant, Banshi Lal and Dehi Prasad, and were in April 1863 found to be creditors to the extent of Rs. 30,000 in the two sums of Rs. 25,000 and Rs. 5,000. The firm failed in 1864, and the defendant alleged that he had, by selling his property to his wife, assisted his sons with money. The bond sued on was dated the 2nd May 1863, and contained no allusion to the partnership dealings, but stated that Rs. 25,000 was due to one of the plaintiffs, and Rs. 5,000 to the other. The defendant denied the signature to the bond, and alleged that the deed was forged. It was not registered.

The Principal Sudder Ameen of Monghyr found that Mawji Lal was a partner in the firm carried on by his sons, and this being so, he held that the *factum* of the bond was supported by the probabilities of the case, as well as by evidence of attesting witnesses.

The High Court, in reversing this decision, gave the following judgment:—

"This is a suit on a mortgage bond, and the sole question is whether it ever was executed by the appellant, Mawji Lal. The Lower Court has held that it was, and has given the plaintiffs a decree. On a careful consideration of all the evidence, however, we are of opinion that the judgment of the Lower Court ought to be reversed, and that the plaintiffs' suit ought to be dismissed. We are satisfied that this bond was not executed by the appellant, Mawji Lal, and that it is put forward by the plaintiffs, in order to establish his liability for the debts of a firm which did business in the name of his sons, Banshi Lal and Dehi Prasad. The Lower Court has found, and perhaps correctly, that Mawji Lal was a partner in that firm. But the Court has laid too much stress on that fact, and has erred in thinking that it helps to prove that this bond is what it purports to be. If Mawji Lal was in reality, although not openly, a partner, that is no doubt a good reason why the plaintiffs should try to get from him an acknowledgment of his liability for the firm's debts: but it does not, as it seems to us, add to the probabilities of the story that, the firm being in insolvent circum-

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stances, Mawji Lal, whose connection with the firm it would otherwise have been very difficult to prove, should voluntarily come forward and give this bond.

The signing of the bond is sworn to by three or four witnesses. The appellant, Mawji Lal, however, positively denies that he signed it, or that he ever borrowed money from, or was in any account indebted to, the plaintiffs. Although the bond is for so large a sum as Rs. 30,000, and is said to have been signed in a house in Monghyr in the immediate neighbourhood of a Register office, it has not been registered. We think that this fact operates very unfavorably to the plaintiffs' case when the circumstances under which the bond is said to have been given are borne in mind, and we cannot concur with the Lower Court in accepting as sufficient the plaintiffs' explanation of their reasons for not registering, namely, that because Mawji Lal was a relation, they, from motives of delicacy, abstained from having the deed registered. Further, we find that, subsequent to the date of this document, Mawji Lal sold to his wife the very properties which it purports to mortgage to the plaintiffs. We cannot understand what object Mawji Lal could have had in making this transfer, if he knew that he had already given this mortgage to the plaintiffs; while, on the other hand, we can very well understand why he should have assigned his property to his wife, if he believed it to be then unencumbered, and knew that the plaintiffs and others were threatening legal proceedings with a view to having him made liable for the debts of the firm of Banahi Lal and Debi Prasad. The plaintiff, Gangaprasad, was examined, and, never mentioning the firms, spoke as if all the money advanced had been advanced solely to Mawji Lal. He says—"I do not know what Mawji Lal did with the money borrowed. I do not recollect on how many occasions he borrowed the money. The moneys used to be lent without the execution of documents. The way in which the moneys were borrowed is mentioned in my books." Yet it is perfectly clear that the debt due to the plaintiffs was the debt of the firm, and not of Mawji Lal alone. Mawji Lal may have been liable for it as a partner, but he was not liable otherwise. On the whole, we are of opinion that this bond was not executed by the appellant, Mawji Lal, and that it is a false document set up by the plaintiffs, in order to establish Mawji Lal's liability for the debts of the firm of Banahi Lal and Debi Prasad, and to get over the difficulty thrown in the way of creditors of that firm by the assignment made by Mawji Lal to his wife. What Mawji Lal's real liabilities in respect of that firm may be, we need not now consider.

We reverse the judgment of the Lower Court, and dismiss the plaintiffs' suit with all costs in both Courts."

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The plaintiff, Gangaprasad, then appealed to England.

Sir R. Palmer, Q. C., and Mr. Leith for the appellant.

Mr. J. D. Bell and Mr. Theodore Thomas for the respondents.

Their LORDSHIPS delivered the following judgment :—

This is an action on a bond which was given, accompanied by a mortgage, and it also seeks to set aside a subsequent sale by the defendant, who granted the bond of the property mortgaged to his wife : and the defence was that the bond was a forgery, and was never executed by the defendant. The Principal Sudder Ameen, the first Judge who heard it, and who also heard the witnesses, came to the conclusion that the bond was executed : the High Court came to a contrary conclusion : and their Lordships have to determine on which side the evidence really preponderated, and with which of the two judgments they agree.

Now, the signature to the bond was in the first instance proved by the plaintiff, by two of the attesting witnesses, and by the mooktear who wrote the bond and framed it. The defendant denied that it was his signature, but he did not call any evidence at all to prove that the bond was not in his handwriting : neither did he produce any of his undoubted signatures, in order that the Court might have the opportunity of comparing the disputed signature on the bond with his admitted signatures. Therefore, as far as depends on the direct evidence whether the bond was genuine or not, the evidence on the part of the plaintiff, in support of the genuineness of the bond, appears very greatly to preponderate, because there is the evidence of the attesting witnesses and of the person who drew it ; and there is nothing against it but the evidence of the defendant himself.

But then the circumstances under which the bond was alleged to be executed have to be considered, for the purpose of seeing whether it is probable that such a bond should be executed or not. It appears that there were two sons of the defendant

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who carried on business ; one of them appears to have been not more than fifteen years of age at the time of the trial of the suit, and therefore he must have been very considerably younger at the time when the bond was executed ; and as respects the other son, it appears that he admits that he had no money of his own at all, and that all the money he had he procured from his father. There is some further evidence given as to what had happened in other suits, which may tend to prove that the defendant was a partner in the house of his sons, or rather, in fact, that he was carrying on business in his sons' names. The High Court appear to have believed that ; at least, they say that they do not come to any contrary conclusion on that part of the case. Then it appears that the sons, or the house of business, were unquestionably in some difficulties at the time when this bond was given ; and it appears also that one of the brothers of the plaintiff had married a daughter of one of the defendants. Then the bond is given for two separate debts ; one a debt of Rs. 25,000, due to the first plaintiff, and another a debt of Rs. 5,000, due to the second plaintiff. The first strong corroboration on the part of the plaintiff's case was the entries in the books of the defendant's two sons, and these prove beyond all question that these two debts of Rs. 25,000 and Rs. 5,000 were due, and therefore there is no doubt that there was an actual debt of Rs. 30,000. They add up those two sums which are entered in the cash-book—"amount due to you Rs. 25,000, besides which there is due to Madhusudan Lal Rs. 5,000, in all Rs. 30,000 ;" and then it mentions the date, which is the same date as the date of the bond ; then it states the interest, and then it states Rs. 100 for Gangaprasad's paper. The sums of principal are added together, and the two sums of interest and the sum for the stamp are also added together. That is very strongly relied upon—and their Lordships think properly relied upon—by the Principal Sudder Ameen, as showing that some security or another was given for the entire debt. Then one of the defendants, the elder son, who carried on this business, was called to explain this. No doubt he tries to give an explanation that a chitta was given for the Rs. 25,000, and a separate one for the

Rs. 5,000, and that the Rs. 100 stamp was the stamp which was got for the Rs. 25,000. That, their Lordships think, is not altogether a satisfactory explanation. It was not brought forward by him in the first instance; it came out on cross-examination, and appears to be nothing more than the natural sort of explanation that a man might be driven to who saw what strong evidence this account gave against him.

Then, there is a further confirmation by the evidence of one of the defendant's witnesses, who appears to have been present at the time when the deed was executed by which the defendant professed to sell the property mortgaged to his wife; and there, on cross-examination, he certainly appears to say—"Having written the deed of sale, I made it over to Mawji Lal. Mawji Lal took it away with him to his house. Montaz Ali, in that *majlis* (assembly), and in the presence of Mawji Lal, spoke about the *tamasruk* (bond) to Gangaprasad and the pledge, on which Mawji Lal said 'he has to do with his own money, what business is it of yours?'" The great importance of that evidence rests on this, that it appears to prove, by the evidence of a witness called on the part of the defendant, that the bond was in existence prior to the time when the deed was executed by which the defendant sold his property to his wife; and if that were the case, then that gives an answer to the theory of the High Court, who are of opinion that this bond was forged for the express purpose of defeating that deed, in order that they might apparently have a mortgage which would take precedence of that deed.

Then, the other matter that is relied upon as against the genuineness of the bond is the stamps. It appears that there are two Rs. 50 stamps on it. They appear to have been purchased only a short time before, in the month of April, and they appear to have been purchased by a person who was one of the witnesses to the bond. That person was not called, and it does not appear whether he was a witness who, in fact, belonged to, and was connected with, the defendants, or whether he was a witness connected with, the plaintiff; and it appears perfectly consistent that the defendant's sons or the defendant,

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in their ordinary business having purchased two Rs. 50 stamps a short time before, had inserted it on this bond, and that is the reason why it is charged in the accounts.

Then, another matter, which is strongly relied upon, is the non-registration of the bond, and it may be admitted that, *valeat quantum*, that is evidence to some extent against the genuineness; that it is to say, it seems more probable that it would have been registered, because it appears by an Act which was then in force, unless it was registered it would not be binding, at any rate as against a subsequent mortgage; that it would not bind as against a subsequent sale, appears more doubtful, but at any rate not as against a subsequent mortgage. On the other hand, it is said that it may have been understood at the time that it was not to be registered. The parties were at that time friends, and to a certain extent connexions, and registering a bond of this kind might destroy the credit of the house, and bring them at once to insolvency, and, therefore, it well may be that it was understood at the time it should not be registered. There appears some reason for that, because, by the laws of registry, when a deed is registered, the Registrar requires that both parties should be present, either by themselves or by somebody appointed by them; and, therefore, if a person executes a bond of this kind, and says—"I will give you a bond, and I will put a charge on my property, but I will not consent to have it registered, it must be an understood thing that it shall not be registered:" if that is the understanding, the other side apparently cannot get the deed registered at all, at any rate, they could not do so without a suit which there might be great difficulty under such circumstances in maintaining, and, therefore, it does not appear anything extraordinary that the defendant should have said—"I gave a bond for this debt of my sons, which I know I am in all probability liable for myself. I make it payable in two years. I get two years' credit, and I will charge my estate with it, but it must not be registered." There is nothing very extraordinary in an agreement of that sort being entered into. At any rate, their Lordships are of opinion that the mere circumstance of its not being registered is not sufficient by

itself to overbalance the evidence which appears to their Lordships to be generally satisfactory in proof of the validity of the bond. 1871

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Then, assuming the bond to be genuine, it is hardly necessary in this case to determine whether the subsequent sale would, if it were a really valid sale, prevail against the bond, for it appears very clear to their Lordships that the sale was a sham; in fact, that it was no real sale, and there is no satisfactory evidence of a farthing of money being paid under it, and it looks simply like a pretended sale made for the express purpose of defrauding the defendant's creditors. Their Lordships are of opinion that the defendant has produced no evidence at all which really is of any value in contradiction to the case of the plaintiff.

Their Lordships will recommend to Her Majesty that the judgment of the High Court should be reversed, and the judgment of the Principal Sudder Ameen should be affirmed, and that the plaintiff should have the costs before the High Court, and also the costs of this appeal.

Judgment reversed.

Agent for appellant : Mr. Wilson.

Agent for respondents : Messrs. Watkins and Lattey.

FATI CHAND SAHU (PLAINTIFF) v. LILAMBER
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P. C.*
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July. 3.

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

Registration of Deeds—Act XX of 1866.

Where a deed, which ought to be registered, is refused registration, the party aggrieved should proceed under s. 84 of Act XX of 1866 (1); and if this course is not pursued, he cannot make use of the document as evidence in a civil suit brought by him to enforce specific performance of the terms of the deed, and to set aside a subsequent deed as fraudulent.

See also
11 B. L. R.
408.
I. L. R.
2 Cal 82.

* *Present*:—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, LORD JUSTICE
JAMES LORD JUSTICE MELLISH, AND SIR LAWRENCE PEEL.

(1) See Act VIII of 1872, s. 72.

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THIS was an appeal from a decision of the High Court (Kemp and Phear, JJ.), dated 30th March 1868, reversing a decision of the Principal Sudder Ameen of Bhaugulpore, dated 26th June 1867.

The case of the plaintiff was that the respondents, being in difficulties, asked him to buy from them some land, which he agreed to do for a sum of Rs. 22,500, which sum the appellant then paid. The respondents being anxious to get the money at once, and there being a difficulty in getting a stamp of the proper amount, the following agreement was drawn up and signed by three of the respondents for themselves and their brother :—

"Whereas Mauzas Baeser 'ash' (original) with its 'dakhils' (dependencies), being a 7½ annas share out of the entire 16 annas, the sudder jumma whereof is 260 rupees and 3 annas, 4½, and *kamar-kushai* on account of the jote of Goormaittha, comprising 14 bigas, 1 kata, 5 dhurs of land, the sudder jumma whereof is, owing to a *batwara*, Rs. 5, and *kamar-kushai*, together with 50 bigas of land, the sudder jumma whereof, owing to the *batwara*, amounts to Rs. 17, and the *kamat* is the purchase of Haridhan Misra, the number of all of which mauzas is 3,863 in Zilla Bhaugulpore together with the fisheries, right to fruit, forest rights, tufts of bamboo-trees of mango and jack, both barren and productive, and all the rights to the zemindari acquired by our ancestors, which have up to the present moment been in our possession and holding, without the co-partnership of any, the whole and entire of the said mauzas and *kamats* we have sold or Rs. 22,500, a moiety of which is Rs. 11,250 to Fati Chand Sahu, son of Narayan Sahu; out of the Rs. 22,500 we have received Rs. 7,500 for satisfaction of the decree of Madan Lal Das, plaintiff, decree-holder. The balance Rs. 15,00 we made a transfer to Colonel Hamdill, on account of the mortgage of the mauzas and *kamats* aforesaid. I legally declare and give in writing in regard thereto that I will execute a proper deed of sale within a month from this time. We have executed an *ikrarnama* for the same that it may be useful when required, and when a proper stamp comes, we will draw up the real deed of sale. We shall raise no objections therein. Should we raise objections or excuses, the operation of the law will then be brought to bear. Dated 2nd Aswin 1274 (25th September 1866.)'

This document was presented for registration on the 2nd

ber 1866, whereupon the respondents appeared before Registrar, and denied that they had executed it, in consequence of which the Sub-Registrar, on the 15th November 1866, refused to register it, and his order was affirmed on the 5th November 1866 by the Registrar of the district.

On the 15th November, a deed, which the appellant impeached, which was so considered by the Court of first instance, was executed by the respondents who appeared and Srinandan Sing, selling to the latter the premises in question. This was registered on the 28th November 1866.

Immediately after the decision of the Registrar refusing to register the appellant's document, the respondents refused to execute a bill of sale, or to give possession of the premises to the appellant, and the latter, thereupon, commenced the suit now under appeal, seeking for specific performance by having a deed of sale executed and registered; he also sought to obtain possession of the property and set aside the deed of the 20th November 1866.

The respondent, Koer Srinandan Sing, and the other respondents, put in separate written statements, the former relying on the deed of the 20th November, and on the appellant's agreement not being registered; the latter also, relying on the deed of the 20th November 1866, and impeaching the plaintiff's claim as fabricated and false.

The Principal Sudder Ameen laid down as issues for trial 1st, the truth of the appellant's *ikrar*; 2nd, whether the deed of the 20th November was *bonâ adâ* or collusive; 3rd, whether, the appellant was entitled to a decree for specific performance.

The respondents objected that the appellant's *ikrar* was inadmissible in evidence, as being a document which Act XX of 1866 required to be registered: and the following is the passage of the Principal Sudder Ameen's decision on that point:—

"It is objected to the plaintiff's *ikrar* that it cannot be received in evidence as it was not registered, and therefore the plaintiff's case falls to the ground. S. 49, Act XX of 1866, makes it imperative that no instrument is to be received in evidence, the registration of which is

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compulsory under s. 17, but which has not been registered. As the plaintiff's *ikrar* is an instrument which purports to extinguish, &c. title to immoveable property of more than Rs. 100 value, so it should have been registered. On the contrary, it is argued that the *ikrar* in question is not an instrument which creates any title, but is merely preliminary to it. On referring to s. 18 of the Registration Act, it is found that conditions of sale are excepted from compulsory registration. It may be said that the *ikrar* is by itself a complete instrument, but its completeness is contingent upon the execution of an actual deed of sale; and as that instrument has not been executed, so the *ikrar* cannot be construed as extinguishing the right and title to land. That this construction is the correct one, is supported by the view taken of such deeds by the High Court; see *Bunwares Lal v. Sungum Lal* (1). The Judges observe that it is impossible that the Legislature could have intended this provision (compulsory registration) to apply to deeds which are merely preliminary to the main contract or engagement; or that deeds which step in as mere parts of a transaction were intended to be registered before they could be used as evidence. In the case of *Ramtonoo Surmah Sircar v. Gour Chunder Surmah Sirkar* (2), the Judges observe that a deed which was simply a contract to sell land at some future time on receipt of a certain sum not then paid, did not require registration. From the above it is clear that the *ikrar* of the plaintiff also does not require registration."

The Principal Sudder Ameen, having determined that he was entitled to receive the *ikrar* as evidence, decided all the issues in the plaintiff's favor, and on the 26th of June 1867, passed a decree declaring him entitled to the relief sought, and to a deed of sale of the property in dispute, and also to possession of the property.

On appeal the High Court reversed that decision, giving the following judgment:—

"The plaintiff sues the defendants to enforce the execution by them of a deed of absolute sale, and to obtain an order for its registration, and also to obtain possession of the property the subject of the sale. To establish that the defendant had agreed to execute the bill of absolute sale which he sues for, the plaintiff puts in a document said to be signed by the defendants.

On consideration of the terms of this document, it appears to us

(1) 7 W. R., 280.

(2) 3 W. R., 64.

that it exhibits a contract by which the defendants express that they have sold to the plaintiff, for a consideration therein mentioned, the property in question, and further undertake to execute a conveyance of the same within a month. In other words, it is an instrument, the purport of which is to give the plaintiff an interest in certain immoveable property, within the meaning of cl. 2 of s. 17 of Act XX of 1866; and therefore by the provisions of s. 49 of the same Act, it is not receivable in evidence in any civil proceedings in any Court, unless it is registered according to the provisions of the Act. But this document is not registered, and therefore we are unable to look at it. It follows that as without this evidence the plaintiff cannot make out his case, the plaintiff's suit must be dismissed. Accordingly we reverse the decision of the Lower Court, and dismiss the plaintiff's suit with costs."

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Against that decision the plaintiff appealed to England.

Mr. *J. D. Bell* for the appellant.—The case is one of peculiar hardship. The document was only the commencement of the proceeding, and was to be followed by the deed of sale. Under the old Acts XIX of 1843 and XVI of 1864, registration would not be necessary—*Ramtonoo Surmah Sircar v. Gour Chunder Surmah Sircar* (1) and *Bunwaras Lal v. Sungum Lal* (2). Even if it did require registration, the parties cannot take advantage of their own fraud; and this suit is in fact to declare the subsequent deed fraudulent and to prevent its registration giving it priority. If this decision is sound, it opens the door to fraud, as the *factum* of the document cannot be proved, save in a suit like this. But even if the deed were rightly rejected, there was sufficient evidence to entitle the Principal Sudder Ameen to decree as he did; and according to the principles of the Evidence Act (II of 1855), s. 57, the Court of Appeal ought not to have reversed that decree; and it is competent to the Board to affirm the decision of the Court below, or to refer it back to the High Court to take the whole evidence into consideration independent of the deed.

Mr. *Doyne* for the respondent was not called upon.

Their LORDSHIPS delivered the following judgment :—

(1) 3 W. R., 64.

(2) 7 W. R., 280.

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In this case the appellant brought his suit, which was in the nature of a bill for specific performance, claiming to have the contract entered into by the instrument in question carried out, and, on the footing of that, a deed of absolute sale executed; and he added that the suit was also for issuing "an order for its registration." Their Lordships understand those words to import a prayer that the deed of absolute sale when executed might be ordered to be registered, and not to point to the registration of the instrument upon which the suit was brought. This prayer was probably inserted with a view to meet the difficulties which it was apprehended might be occasioned by the prior registration of the defendant's document of date subsequent to that of the instrument on which the appellant sued. The Court of first instance found that this instrument was not one which the Registration Act now in force required to be registered, admitted it accordingly in evidence, and upon the merits made a decree in favor of the plaintiff. The case then went by appeal to the High Court, and the objection was there taken that the instrument being one which the Act requires to be registered, and which had not been registered, it was not receivable in evidence, and that therefore there was no foundation for the plaintiff's suit. The decision of the Court below was accordingly reversed, and the suit dismissed with costs. The appeal before us is against that decision.

It appears to their Lordships that, although this case is undoubtedly an extremely hard one, they are bound to affirm the decree of the High Court. The Registration Act recently passed in India is extremely stringent. Their Lordships have, in the first place, no doubt whatever that the instrument in question is one which, by the 17th section of the Act, is required to be registered; that it is an instrument acknowledging the payment of the consideration-money for what was to be ultimately an absolute sale of the property in question, for what in equity did presently operate as a sale of the property. The 49th section of the Act says that no document that has not been registered under the Act, supposing it is one which ought to be registered, is receivable in evidence. The procedure which the Act prescribes is of this kind: the party see-

ng to register a deed is, under the 36th section, to go first before the Registrar or, as in this case, a Sub-Registrar. If the Sub-registrar refuses to register the deed, there is then an appeal from his refusal, upon whatever reasons it is founded, to the Registrar, the next higher officer ; and if that person confirms the order refusing the registration, the 84th section gives to the party aggrieved the power of going by petition to the Zilla Judge. In the present case the Sub-Registrar, and afterwards the Registrar, refused to register the instrument, because the parties, the respondents, by whom it purported to have been executed, denied that they had executed it. It has been argued that the Act affords no means for trying such an issue as was thus raised ; and consequently that, unless the unregistered instrument be admitted in evidence in a regular suit wherein the fact of its execution can be tried, the right of the party claiming under it would be defeated by the false and dishonest denial of his own signature by the opposite party. Their Lordships, however, looking to the words of the 84th section and the form of the petition given in the schedule and in particular to the fourth paragraph of that form, which contains the words "the said C. D. appeared personally before the Registrar and falsely denied the execution of such instrument," think that the Zilla Judge would have jurisdiction to determine such a question. Power is expressly given to him to summon the parties, and their Lordships imagine that there must also be power to summon witnesses, if witnesses should be necessary. How the Zilla Judges may deal with this statutory jurisdiction, their Lordships are unable to say. It seems, however, reasonable to suppose that, if they saw that a *prima facie* case of execution of the deed was made out, they would direct the document to be registered, and refer the parties to try the question of forgery or non-forgery in a regular suit. Such a decision would not finally bind the rights of the party denying the execution of the document, and, on the other hand it would not preclude the opposite party from proving in a less summary proceeding that the denial was false. Their Lordships must assume, in the absence of any proof to the contrary, that the Judges exercise this jurisdiction in a reasonable and proper manner.

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Well, then, how do the facts stand upon this case? The appellant went before the Sub-Registrar, and he appealed to the Registrar. He then, unfortunately for himself, through bad advice or some other cause, omitted to proceed as the Act directs under the 84th section, in which case he might have obtained the registration of the deed in the way I have suggested and brought this suit relying on a non registered deed. He failed to pursue the remedies given him by the Act, or at least to exhaust those remedies. It seems impossible to their Lordships, under these circumstances, to say that, acting under the provisions of a very useful, though stringent, statute, the Judges of the High Court have miscarried in ruling that the document, not having been registered, was inadmissible in evidence, and that the plaintiff's suit had wholly failed. Their Lordships feel that this may be a very hard case; they would willingly have relieved the party if they could, but to make any special order, such as that suggested by Mr. Bell, seems to their Lordships to be beyond the functions and province of an Appellate Court. It may be that the appellant may be able partially to obtain relief, since part of the consideration-money seems to be still in his hands. Their Lordships, however, dealing with this appeal, have but one course before them, which is humbly to recommend Her Majesty to dismiss the appeal with costs.

Appeal dismissed.

Agents for the appellant: Messrs. *Clarke, Sen, and Rawlins.*

Agent for the respondents: Mr. *Barrow.*

[ORIGINAL CIVIL.]

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Markby.

C. W. JOSEPH (PLAINTIFF) v. E. R. SOLANO (DEFENDANT).

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Aug. 3.

Promissory Note—Consideration—Lottery Act, V of 1844—Act XXI of 1848—Act V of 1866—Plaint—Written Statement.

The defendant agreed with the plaintiff to take the plaintiff's mare "Bridesmaid" on "racing terms,"—all winnings to be divided equally between them, and the plaintiff to have the option of claiming a one-fourth share of any lottery in which she might be bought by or on account of the defendant; the plaintiff to keep and train "Bridesmaid" for Rs. 60 a month. Subsequently the plaintiff agreed to keep and train for a like sum for each horse, five horses belonging to the defendant. The defendant having been posted as a defaulter, the plaintiff at the defendant's request advanced certain sums to the Secretary of the Calcutta Races to enable the defendant's horses to run. As security for the repayment of such advances, and of a sum of Rs. 4,456-6 which had become due to the plaintiff, and which included an item of Rs. 1,149 for "balance of bets and lotteries" and a smaller sum in respect of certain tickets in the "Secundra Raffle," the defendant gave to the plaintiff a letter of hypothecation of his five horses, whereby it was agreed that in case of the defendant's default, the plaintiff should be at liberty to sell the horses. The defendant made default, and the plaintiff advertised the horses for sale. On the same day the defendant wrote and gave to the plaintiff a letter, stating that, in consideration of the plaintiff's withdrawing the advertisement, and withholding the sale for a certain period, he would give the plaintiff a promissory note for the balance of his claim. A note for Rs. 7,000 was accordingly given by the defendant to the plaintiff. In the account delivered by the plaintiff to the defendant, he had by mistake over-credited the defendant with Rs. 744 in an item headed "cash received from the Secretary of the Calcutta Races, balance of racing account," and under which was included the following item "I. O. U., deducted from lottery account, Rs. 480." On receiving information of the error, the defendant gave the plaintiff another promissory note for Rs. 744. In an action on the notes brought under Act V of 1866, the plaintiff obtained a decree, which was set aside on the defendant's application, and leave was given to him to appear and defend. Written statements were then filed on the plaintiff's application,

Held by MACPHERSON, J., that the two promissory notes were given as a security for the whole of the plaintiff's claim; that the items for "balance of bets and lotteries" and for the "Secundra Raffle" being rendered illegal by the Lottery Act (V of 1844), part of the consideration for the notes was illegal, and no action was maintainable upon them. His Lordship, therefore, dismissed the plaintiff's suit.

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On appeal held by COUCH, C.J., that the promissory note for Rs. 7,000 was not vitiated by the Rs. 1,149 being part of the consideration for it, although that portion of the latter sum which was won by lotteries was obtained by an illegal transaction, it was not illegal for the defendant to receive the money, and, having done so, to pay the plaintiff his share or to promise to do so. But the money paid in respect of the "Secundra Raffle," being money paid in execution of an illegal purpose, was an illegal consideration which disentitled the plaintiff to recover on the note. Held further, that the note for Rs. 744 was given upon good consideration. All the facts of the case being stated in the plaintiff's written statement, the Court might allow the plaint to be amended, and frame an issue as to what amount was due to the plaintiff in respect of the consideration for the note for Rs. 7,000.

Held by MARKBY, J., that both notes were good, inasmuch as the promise contained in them did not spring from, nor was it the creature of, the original illegal agreement, but was a separate agreement.

APPEAL from the judgment and decree of Macpherson, J., dated the 24th of April 1872.

The suit was brought to recover Rs. 7,744, due on two promissory notes for Rs. 7,000 and Rs. 744 respectively, payable to the plaintiff on demand, and given under the following circumstances: In July 1871 the defendant entered into a written agreement with the plaintiff to take the plaintiff's mare "Bridesmaid" on "racing terms,"—all winnings to be divided equally between the plaintiff and defendant, and the plaintiff to have the option of claiming a one-fourth share of any lottery in which she might be bought by the defendant or on his account. It was at the same time agreed that the plaintiff, who was by profession a trainer of horses, should keep and train "Bridesmaid" for Rs. 60 a month; and it was subsequently agreed that he should keep and train five horses belonging to the defendant for a like sum of Rs. 60 for each horse. "Bridesmaid" having won several races, there became due to the plaintiff as he alleged, a sum of Rs. 4,456-6 in respect of such winnings and of charges for training and keeping the horses. In December 1871, the defendant applied to the plaintiff to advance him Rs. 2,550, which had to be deposited by the defendant in the matter of a certain reference from the stewards of the Mirat Races to the Calcutta Turf Club before any horse of the defendant could be allowed to run at the Calcutta Race Meeting which was then about to take place, and also such sums as it might be

necessary to pay for the entrance fees of the six horses at such meeting. The plaintiff agreed to make the advances on certain terms which were embodied in a letter from the defendant to the plaintiff, dated 22nd December 1871, and which was in the following terms:—

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"SIR,—As security for the payment by me to you of the following sums, viz:—

	Rs.
Half "Bridesmaid's" winnings at Sonapore ...	1,180
Half value of three cups ...	750
Balance of bets and lotteries ...	1,149
Balance of bills up to end of November ...	1,157
Half "Bridesmaid's" winnings at Barrackpore ...	220

Total, Rs. ... 4,456

And in consideration of your advancing on my account the sum of Rs. 2,550 as a deposit in the matter of the reference from Mirat, and also such farther sums (not exceeding in the whole, together with the sums above-mentioned, Rs. 10,000), as it may be necessary to pay for entrances, I hereby declare that you shall, as from this date, hold my five race-horses—"Rising Star," "Velona," "Pirate," "Sukman," and "Sultan"—as mortgagees in possession thereof; and I hereby charge the same horses with the payment, at the expiration of one week after the last race of the First Calcutta Race Meeting, of all moneys (not exceeding as aforesaid) at that period due by me to you; and I authorize you in the event of my making default in payment of such moneys at the time aforesaid, to sell the said horses or any of them either by public or private sale, and subject to such conditions, and generally in such manner, as shall to you seem proper.

I am, Sir,

Your obedient servant,

E. R. SOLANO."

Upon receiving this letter, which was signed immediately before the First Calcutta Race Meeting, the plaintiff handed to the Secretary of the Calcutta Races a blank cheque signed by the plaintiff, which he authorized the Secretary to fill up for such sum as was required, and which the Secretary filled up for Rs. 2,000. On the 15th of January, after the First Calcutta

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Race Meeting, the plaintiff gave to the defendant an account, which showed a balance of Rs. 6,874-10 in the plaintiff's favor. This sum comprised the Rs. 1,149, "balance of bets and lotteries," and also the two following items—"four tickets in Secundra Raffle, Rs 64," and "one do. do. for Mr. Wollen, Rs. 16"—which had been included in the Rs. 1,157, "balance of bills up to the end of November," in the account contained in the defendant's letter of 22nd December 1871. The defendant having failed to settle this account, the plaintiff's solicitors wrote to him on the 16th of January, threatening a sale of his horses under the power contained in the letter of hypothecation, and on the following day the horses were advertized for sale on the 20th January. On the same day the defendant wrote and gave to the plaintiff the following letter :—

"17th January 1872.

DEAR SIR.—In consideration of your withdrawing the advertisement anent the sale of my horses, and withholding their sale until four days before the commencement of the Second Calcutta Race Meeting 1872, I will give you a promissory note for the balance of your claim. The claim to be satisfied in the beginning of the Second Meeting.

Faithfully,

E. R. SOLANO."

The promissory note for Rs. 7,000 was then given, the plaintiff undertaking to credit the defendant with the amount in excess of the balance due. In the account delivered on the 15th January, the plaintiff had credited the defendant with a sum of Rs. 2,662-15-11, as cash received from the Secretary of the Calcutta Races, as the balance of the defendant's account for the First Meeting, and which balance the plaintiff had been authorized by the defendant to receive, but had not in fact received, the sum of Rs. 744 having been deducted by the Secretary of the Calcutta Races on account of certain items with which he had omitted to debit the defendant in his racing account ; one of such items was an "I. O. U., deducted from lottery account, Rs. 480." The defendant, on receiving information of the error, gave the plaintiff the second promissory note for Rs. 744.

The suit was brought in the first instance under Act V of 1866, and the plaintiff obtained a decree. This decree was subsequently set aside on the defendant's application, and leave was given to him to appear and defend; the plaintiff then applied for written statements to be filed, and this was accordingly done.

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The material defence set up in the defendant's written statement was that the notes were given for an illegal consideration namely, to secure the payment of a half share of sums won by the plaintiff in horse-racing and in certain bets and lotteries, and half the value of three cups won by the defendant in horse-racing. The evidence adduced at the trial showed that the bets and lotteries were all in the defendant's name, and, with reference to a share of certain sums won at Sonapore, the receipt of which the plaintiff had acknowledged, the defendant deposed:—

"I won Rs. 6,000 and gave him (the plaintiff) half. It was Suliman's winnings, I made him a present of it. * * * * I gave him a share in the bets and lotteries at Sonapore. I don't know what amount; He was not entitled to any share except in 'Bridesmaid's' winnings, or when I bought the horse in a lottery."

MACPHERSON, J. (after stating the facts continued).—The consideration for the promissory note of Rs. 7,000, as it appears to me, was this, that Solano, in consideration of the plaintiff's withdrawing the advertisement of the sale of the horses, and withholding the sale until four days before the beginning of the Second Calcutta Race Meeting, agreed to admit the correctness of the balance shown in the accounts which had been delivered, and as to which there had been a dispute on the 15th January, and to take that balance roughly at Rs. 7,000, on the understanding that the difference between Rs. 7,000, and that balance should be credited to him in his current account. The plaintiff has made a mistake and is confused as to the time when the letter originally written by the defendant at the Great Eastern Hotel was altered: but except as to that, I have no doubt what he says is substantially correct.

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(His Lordship proceeded to state the history of certain negotiations which had, however, fallen through, and continued.)

In this suit the items of the account, making up the balance for which the promissory notes were given, were not properly in issue. I may say, however, with reference to the dispute as to the extra charges for training, that there is nothing to lead me to suppose that the plaintiff was not entitled to make those charges. Messrs. Hunter and Co. make them. Mr. C. Martin a gentleman of great experience in racing matters, says the charges are all perfectly fair (except perhaps the charge for a pail), and Mr. Wilson gives the same evidence. It may be that Messrs. Smith & Co. do not make these charges; but there is clearly nothing unusual in their being made. As to the dispute about the "winnings" of "Bridesmaid," I think that probably the entrance and jockey's fees should have been first deducted from the gross winnings, and then the balance or net winnings divided between the parties. However that may be, the defendant agreed to accept the account as made up by the plaintiff; and I am bound to say that I see no evidence of fraud or other special misconduct on the part of the plaintiff. There may have been looseness of dealing on the part of the plaintiff; but it is more than equalled by the greater looseness on the part of the defendant. The whole case shows the utter unfitness of a Court of law to deal satisfactorily with these racing transactions. On the whole, I find that these debts were admitted by the defendant to be due after full opportunity for consideration; and I cannot see that he has any excuse for saying that he was unfairly dealt with.

But there is yet another question in this case, the question, namely, whether the plaintiff is entitled to have the assistance of a Court of Justice to enable him to recover these debts. In other words, are these two promissory notes bad, because given for a consideration which was in part illegal? There is no doubt that the balance of Rs. 6,874, appearing on the account rendered on the 15th of January, is the balance in respect of which the note for Rs. 7,000 was given, and in that account there are at least two items which, on the face of them, show an illegal consideration,—the one is "balance of bets

and lotteries at Sonepore, Rs. 1,149," an item which also appears in the letter of hypothecation; the other is, "four tickets in Secundra Raffle, Rs. 64." There is no doubt that these items are absolutely illegal under the law relating to lotteries in India. Mr. Lowe says that I must put out of sight altogether the question whether the original consideration was legal or not, and must treat the case as one in which the promissory notes were given merely to prevent the sale of the horses. But it is impossible for me, on the facts, to take this view of the case. When the plaintiff put forward his advertisement, he was claiming a particular balance shown on an account which included these illegal items; and in order to obtain the payment of that balance, he advertised the horses for sale. The defendant said—"If you withdraw your advertisement, I will pay that balance." The promissory note was given, not merely because of the existence of the advertisement, but because of the advertisement and the existence in Solano's mind of the knowledge that he owed the plaintiff some such balance as he claimed. The advertisement was, no doubt, the immediate motive power which made him give those notes; but the real agreement between the parties was that Solano would admit the accounts to be correct, and would pay the balance shown by them to be due from him, if the sale was stopped. The illegality of the consideration extends to but a portion of the claim, but the promissory notes were given as a security for the whole balance; consequently part of the consideration is illegal, and I am bound to hold that the notes as a whole are tainted with illegality, and that no action is maintainable on them.

The case of *Bubb v. Yelverton* (1) was referred to. It goes far in favor of the plaintiff's contention no doubt, but it is distinguishable from this case in several respects. In that case a formal bond had been given, not for the racing debts of the Marquis of Hastings, but the abandonment, by his creditors, of proceedings instituted against him before the Jockey Club. There is also nothing in that case to show how the accounts were made up, or how the sum was arrived at which was secured by the bond. Moreover, the circumstances in *Bubb v.*

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Yelverton (1) were altogether peculiar. Sir Roundell Palmer, who supported the bond, argued thus :—" It will be contended on the other side that this bond was given to secure a racing debt and is void ; but we say, in the first place, that the consideration for the bond was the abandonment by his racing creditors of proceedings against the Marquis of Hastings before the conventional tribunal of the Jockey Club ; and, in the next place, that a wagering contract is not illegal, and that a bond given to secure a wager is not illegal, but simply voluntary ; and as all the creditors of the Marquis for valuable consideration have been paid in full, we do not care to claim any higher position." And the Master of the Rolls in giving judgment says—" But here there was a perfectly good consideration, quite ulterior to, and independent of, any racing debt. It is quite impossible to read the evidence without seeing that it was given, not to pay racing debts, but to avoid the consequences of not having paid them." It is to be noticed further that in *Bubb's* case (1) racing debts only are mentioned, and it is not stated that any of the debts arose out of lotteries and were therefore illegal.

The suit is dismissed, but without costs.

The plaintiff appealed.

Mr. *Lowe* and Mr. *Fergusson* for the appellant.

Mr. *Jackson* and Mr. *Forsyth* for the respondent.

Mr. *Lowe*.—The plaintiff's suit was dismissed on the ground that part of the consideration for the notes was illegal ; but as to the note for Rs. 7,000, the real consideration was the withdrawal of the advertisement of sale of the defendant's horses, and the postponement of that sale ; and the note for Rs. 744 was given on account of an excess credited to the defendant by mistake. [Mr. *Jackson*.—Part of that excess was Rs. 480 on a lottery account.] The plaintiff had nothing to do with that ; he never received the money. If the learned Judge thought that any of the items in his account were illegal, he should have struck them out, and allowed the rest. [Couch, C.J.—Had your plaint been properly framed with regard to the consideration, you might have

(1) 9 L. R. Eq. 471.

recovered a portion of the amount claimed, but you sued only on the notes.] This was a suit under Act V of 1866; the defendant subsequently obtained leave to defend, and written statements were then ordered to be filed. The plaintiff's written statement gives all the facts of the case, and there are numerous decisions to the effect that the plaint and written statement must be taken together. [COUCH, C.J.—The practice in such cases should be that, when a defendant gets leave to defend, the plaintiff's written statement ought to be treated as a plaint, so as to enable him to show the consideration for the notes.]

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Under the letter of hypothecation of 22nd December, the plaintiff had a right to sell the defendant's horses on his default. [COUCH, C.J.—You must show that that letter was not illegal. If it conferred on the plaintiff no right to sell the horses, stopping the sale would not amount to a consideration.] That letter formed a binding agreement; the consideration, as the letter itself, states, was the advance by the plaintiff of certain sums to enable the defendant's horses to run. The defendant had been posted at Mirat: the present case, therefore, is on all fours with that of *Bubb v. Yelverton* (1). The admission of the correctness of the plaintiff's accounts formed no part of the consideration. It is true that that letter was also given as a security for the repayment of a sum which included Rs. 1,149, "balance of bets and lotteries," but the bets referred to were not bets between the parties, but bets made by the defendant with strangers, a share of which he had voluntarily agreed to hand over to the plaintiff. [COUCH, C.J.—The plaintiff claims a share in the bets and lotteries, as though a partnership subsisted between him and the defendant with respect to them.] The plaintiff was not liable to contribute in any way for losses or for tickets. [COUCH, C.J.—That may be, but there may be a partnership to share in the profits.] The plaintiff claims these sums simply on the faith of the defendant's promise, in the same way that he credited the defendant with the amount which the Secretary of the Calcutta Races had promised to pay to him. The only sum claimed as of right was a share in "Bridesmaid's

(1) 9 L. R., Eq., 471.

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winnings." [COUCH, C.J.—There was nothing illegal in the promise to pay you a certain amount on account of sums which the defendant had won in bets and lotteries, but the promise was without consideration.] Relying on that promise, the plaintiff advanced further sums of money to the defendant.

Mr. Fergusson on the same side.

Mr. Jackson for the respondent.—It is not open to the plaintiff to contend that the agreement was not void, notwithstanding that part of the consideration was illegal, because, in fact, no money was received in respect of that illegal part. The authorities go further than is necessary for the respondent's case. Money knowingly lent for the accomplishment of an illegal transaction is not recoverable, even though the lender is not a party to such transaction—*Cannan v. Bryce* (1) and *M^r Kinnell v. Robinson* (2). Act XXI of 1848 (for avoiding wagers) is almost an exact copy of the first half of s. 18 and of s. 19 of 8 & 9 Vict., c. 109; the last half of s. 18 is supplied by Act VIII of 1867; and the Lottery Act, V of 1844, is similar in its provisions to the English Acts on the same subject,—10 & 11 Will. 3, c. 17, and 42 Geo. 3, c. 119,—even to the extent of the penalty. A raffle comes within the term "lottery." Under those Acts the items of Rs. 64 and Rs. 16 for the Secundra Raffle, and of Rs. 1,149 "balance of bets and lotteries," are in respect of illegal transactions. The letter of hypothecation was expressly given to secure the repayment amongst other sums of the Rs. 1,149. [COUCH, C.J.—Is it illegal for a man who has won money in a lottery to promise to give some of it to another man?] I submit that it is—*Fisher v. Bridges* (3). In that case the Court of Queen's Bench decided that the deed being entirely posterior to the illegal act was good as not being tainted with the illegality, but this was overruled by the Exchequer Chamber. [COUCH, C.J.—That case shows that the real point, is was there an agreement to share the bets and lotteries, or was it a voluntary act by the defendant after the money had been won?] Act V of 1844, s. 3.

(1) 3 B. & A., 179.

(2) 3 M. & W., 494.

(3) 2 E. & B., 118; S. C., in Ex.

Ch., 3 E. & B., 642.

makes the promise to pay the proceeds of a lottery illegal. But the appellant's evidence shows that he claimed a share in the bets and lotteries as of right. The note for Rs. 744 is on precisely the same footing as the note for Rs. 7,000. It was merely supplementary to the original transaction, and is similar to a note given in substitution for another founded on an illegal consideration. It is therefore bad—*Hay v. Ayling* (1), *Preston v. Jackson* (2), and *Wynne v. Callender* (3).

Mr. Lowe in reply.—With reference to the suggestion that the appellant must show that he had a right to sell under the letter of hypothecation, the case of *Cook v. Wright* (4) shows that, if there is a claim *bona fide* made, and the defendant disputes the debt, yet if he give a promissory note for it, he can not resist payment of the note. In *Haigh v. Brooks* (5), Lord Denman, C.J., says,—“The plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it.”

Cur. adv. vult.

COUCH, C.J. (after shortly stating the facts proceeded).—I cannot assent to Mr. Lowe's argument for the plaintiff that the consideration for the note for Rs. 7,000 was the withdrawing the advertisement and stopping the sale of the horses; that was the consideration for the promise in the letter of the 17th of January to give the note; but according to that letter, the note was to be for the balance of the plaintiff's claim; that was the consideration for it. The payment of the note would satisfy the balance, and the plaintiff says he was to return the excess. Nor would the other view assist the plaintiff's case: for the balance of bets and lotteries and the

(1) 16 Q. B., 423.

(2) 2 Stark., 237.

(3) 1 Russ., 293.

(4) 1 B. & S., 559.

(5) 10 A. & E., 309. at p. 320.

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money paid for tickets in the lottery are part of the consideration for the agreement of the 22nd December 1871. If the contract in the note is vitiated by that, the contract in the agreement is also vitiated by it. The agreeing not to enforce a contract which is void for illegality is an illegal consideration, and the contract is void—*Chapman v. Black* (1), *Wynne v. Callender* (2), and *Hay v. Ayling* (3). The substituted contract stands in the same situation as the original.

Now with regard to the Rs. 1,149, balance of bets and lotteries the bets by Act XXI of 1848 were void, and could not be recovered, but the betting was not illegal. But by Act V of 1844, all lotteries not authorized by Government are declared common and public nuisances and against law. Therefore that portion of the Rs. 1,149 which was won by lotteries was obtained by an illegal transaction. But it was not illegal for the defendant to receive the money, and having done so to pay the plaintiff his share or to promise to do so. An agent who has sold goods for his principal, and received the price, is bound to pay it over to his principal, although the contract of sale is illegal and void—*Farmer v. Russell* (4) and *Bousfield v. Wilson* (5). And where two persons joined in an illegal wager which they won, and the whole amount was paid to one of them, the other was held entitled to recover his share from the one who had received the whole—*Johnson v. Lansley* (6). It is said in that case that he is bound upon every principle of justice to pay it. I therefore think that the note is not vitiated by the Rs. 1,149 being part of the consideration for it. But a different rule is applicable to the money paid for tickets in the Secundra Raffle. That was money paid in execution of an illegal purpose; to obtain a share in what was declared by the act to be a common and public nuisance and against law. It is settled that money so paid cannot be recovered—*Cannan v. Bryce* (7) and *M'Kinney v. Robinson* (8),

(1) 2 B. & A., 588.

(2) 1 Russ., 293.

(3) 16 Q. B., 423.

(4) 1 B. & P., 296.

(5) 16 M. & W., 185.

(6) 12 C. B., 468.

(7) 3 B. & A., 179.

(8) 3 M. & W., 434.

and a note given for it is given on an illegal consideration—*Amory v. Merryweather* (1). The money paid for the tickets is but a small part of the consideration for the note; but it is quite settled that, if the consideration is in part illegal, the promise is wholly void. I am therefore, of opinion that the plaintiff was not entitled to recover upon the note for Rs. 7,000.

But then this question arises, whether he may not recover in respect of so much of the consideration for it as is not illegal. The suit was instituted under Act V of 1866, and the plaint is only for the money due on the notes, but all the facts are stated in the plaintiff's written statement. Macpherson, J., says that in this suit the items of the account making up the balance for which the promissory notes were given were not properly in issue, but upon the whole he finds that these debts were admitted by the defendant to be due after full opportunity for consideration, and he cannot see that he has any excuse for saying that he was unfairly dealt with. In *Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer* (2), the Judicial Committee having held that, on the face of the plaint, no relevant case was made against the defendants; but that in a suit properly framed, if he proved his case, he would be entitled to a decree against one, and considering that a new suit would probably be met by a plea of the Act of Limitations, allowed the appellant to amend his plaint, so as to make it a plaint against the defendant alone for the recovery of money due on a bond. They considered that the liability on the bond might be tried on the issues already settled, but they would not intimate any opinion upon them and the evidence, and remanded the suit for re-trial. Macpherson, J., having said that the items of the account were not properly in issue, I think we cannot now, if the plaint is amended, make a decree for the amount of the account, deducting the illegal items. We may allow the plaint to be amended, and an issue to be framed:—What amount is due to the plaintiff in respect of the consideration for the note? I think we have power to do this, and that it might have been done at the hearing if the plaintiff had applied for it.

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(1) 2 B. & C., 573.

(2) 11 Moo. I. A., 468.

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The case of the plaintiff as to the note for Rs. 744 was that, in the account delivered on the 15th of January, he had by mistake given the defendant credit for Rs. 744 more than he had received. It was in the item of "cash received from the Secretary of the Calcutta Races, balance of racing account." It was not illegal for the plaintiff to receive this money, or to give the defendant credit for it, and there is no illegality in the defendant giving a note for what he has been credited with by mistake. It is true that, if the mistake had not been made, the balance for which the note for Rs. 7,000 was given would have been greater. The sum against which this was credited would have been included in the note, and, as due upon it, could not have been recovered, because of the illegal part of the consideration; but this sum was not an illegal claim, and the defendant would be liable to pay it, although the note could not be sued upon. The learned Judge seems to have treated the two notes as jointly forming a security for the whole balance after correcting the mistake, and to have considered he was bound to hold that both were tainted with illegality. I do not think we are bound to do this. The illegal part of the consideration was in the first note, and need not be held to extend to the second. Justice certainly does not require this, if the transaction admits of a different meaning. With regard to this note I think the plaintiff is entitled to recover in the suit as now framed.

Upon the whole case I am of opinion that the decree dismissing the suit should be reversed; that the plaint should be amended by adding a claim for the consideration for the Rs. 7,000 note; and the case should be referred to a Judge to take the account and determine what is due to the plaintiff in respect of it. The plaintiff has partially succeeded in the appeal; but seeing that it might have been unnecessary if he had asked to have the plaint amended, and sought to recover upon the consideration for the note, I think each party should pay his own costs of the appeal and of the hearing before Macpherson, J.

MARKBY, J.—In this case I should be disposed to treat the three items in the account,—that relating to shares received, and those relating to tickets purchased in a lottery,—as standing

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upon the same footing. The allowance of each of these items in the account, I must say, seems to me to stand precisely in the same relation to the original illegal act. It is not, however, very easy to deduct any very clear general principle from the decided cases by which it can be determined whether, where there has been an illegal contract and an illegal act done, a subsequent promise following there can be enforced. The subsequent promise is sometimes held to be "tainted" with the illegality, and sometimes not. And the Judges appear to me to have determined in each case according to their own judgment and discretion whether the illegal act is so far separable from the subsequent promise as that the latter may be enforced. In one set of cases, to use the words of Buller, J. (1), the action is considered to be founded, not on the illegal contract, but on a ground totally distinct from it, in the other set of cases, to use the words of Jervis, C.J., the new promise "springs from, and is the creature of, the illegal agreement." To which of these two classes does the present case belong? Did the promise contained in these promissory notes spring from, and was it the creature of, the original illegal agreements by the defendant to give the plaintiff a share in certain lotteries, and to pay for tickets in them, or was it a separate agreement? Was it made by the parties in the character of offenders against the Lottery Act, or was it made in a wholly different character? Expressed at length, the agreement contained in the first promissory note may be stated thus:—"Whereas you have trained, kept, and expended money upon certain horses belonging to me at my request; and whereas you have paid certain moneys to the Secretary of the Calcutta Races at my request; and whereas you have paid for certain tickets in a lottery at my request; and whereas I have received certain sums of money for bets and lotteries on your account, for all which debts I mortgaged to you my horses, which horses you were about to sell; and whereas at my request you withdrew the advertisement for the sale,—I promise to pay you Rs. 7,000." The original illegal agreement to give the plaintiff a share in the lotteries, and to pay for the tickets, is so far imported into these notes that, had that agreement not

(1) In *Harmen v. Russell* 1 B & P., 290.

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been made, the defendant would probably not have allowed, nor would the plaintiff have claimed, the whole of the item of Rs. 1,149, or any part of the items of Rs. 64 and Rs. 16. But it does not seem to me that for this reason we are bound to say that the promissory notes spring from, and are the creature of, an illegal agreement. No doubt, the illegal promise which had been made was in some sort one of the matters upon which the defendant based his promise to pay, but so it was in many of the cases in which the promises have been upheld.

As, therefore, I think the promissory notes are good and valid notes, it is not strictly necessary for me to say whether the plaintiff may now recover in this suit any portion of the claim in any other form. But as a matter of fact, I do fully concur with the Chief Justice in thinking that, in the view which he takes of the notes, we can and ought to allow the plaintiff so to recover.

Decree reversed.

Attorneys for the appellant: Messrs. *Berners, Sanderson, and Upton.*

Attorney for the respondent: *Mr. Watson.*

[PRIVY COUNCIL.]

P. C.*
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July 17, 18.

FAEZ BAX CHOWDHRY (DEFENDANT) v. FAKIRUDDIN
MAHOMED AHASAN CHOWDHRY (PLAINTIFF).

ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.

Benami—Evidence—Suspicion.

In determining the right to property seized in execution, the Court must not declare a person claiming as purchaser to be a *benamidar* for the debtor upon suspicion merely, but its decision must rest upon legal grounds established by legal testimony.

*Present:—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR ROBERT PHILLIMORE,
LORD JUSTICE JAMES LORD JUSTICE MELLISH, AND SIR LAWRENCE PEAR.

THIS was an appeal from a decision of the High Court (Bayley and Pandit, JJ.) dated 15th January 1866 (1), reversing a decision of the Principal Sudder Ameen of Furreedpore,

The property in dispute belonged to Karim Bax, the appellant's father, who mortgaged it, for Rs. 30,000, to Khaja Abdul Ganni, who, in 1853, absolutely foreclosed and got possession. Karim Bax was in great difficulties, and, amongst others, the respondent held a decree against him for Rs. 3,000 odd, Khaja Abdul Ganni, being a friend of the appellant's family and anxious to assist them, agreed with the appellant to sell the property to him for Rs. 32,000; and the appellant, having obtained an advance of money from one Ganganarayan, agreed to give the latter a patni of the property and a bond for Rs. 4,000. Khaja Abdul Ganni then completed the sale, receiving from the appellant Rs. 25,000 and a bond for the residue; and the appellant gave the patni to Ganganarayan. The documents were duly registered, and possession taken, under them in January 1857.

In 1860, the respondent seized the property as belonging to the appellant's father, Karim; but, on a claim by the appellant the property was released.

The respondent brought the present suit for a declaration that the property belonged to Karim, on the ground that the appellant was *benamidar* for his father.

Khaja Abdul Ganni and Ganganarayan gave evidence, and the Principal Sudder Ameen decided that the transaction was *bonâ fide* on behalf of the son, and that he was the real owner.

The High Court reversed that decision, and the son appealed to England.

Sir R. Palmer, Q. C., and Mr. J. D. Bell for the appellant.—The sole question in such cases is, whose money was used, and who is liable for the money borrowed. A *benamidar* is a person wholly without interest in the property—*Nawab Umjad Ally Khan v. Mussamat Mohumdee Begum* (2). Even in joint families if it be proved that the money came from separate funds of a

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(1) 5 W. R., 43.

(2) 11 Moo. I. A., 517; see p. 546.

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single member, the property belongs to him separately—*Dhurm Das Pandey v. Mussamat Shama Soondri Dibiah* (1). Here the money was clearly the son's, and he was liable upon, and could be imprisonment for non-payment of, the bond. The High Court decided the case on suspicion as opposed to evidence, contrary to the principle laid down in *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (2.) At this point the appellant's Counsel were stopped by the Court.

Mr. Cotton, Q. C., and Mr. Doynes for the respondent.—This being a purchase of what had been the father's property in the son's name, there is a strong *prima facie* case of *benami*. The test is, for whose benefit was the purchase. The sole object of Abdul Ganni was to benefit the father and his family, not the son; and as there were decrees against the father, the son's name as a matter of course, was used, and the finding of the High Court is not founded on suspicion, but on the natural conclusion to which Indian Judges of experience would come in weighing with the direct evidence the surrounding circumstances.

Their Lordships delivered the following judgment:—

In the judgment delivered in the case to which their Lordships have been referred, viz., *Sreemanchunder Dey v. Gopaulchunder Chuckerbutty* (2), there is this passage:—"Undoubtedly there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the appellant; but, in matters of this description, it is essential to take care that the decision of the Court rests not upon suspicion, but upon legal grounds established by legal testimony." That principle is sufficient to dispose of this case which differs from the case referred to in this respect that, in the case now to be decided, there is not, in their Lordships' opinion, any legal evidence to create suspicion, or any doubt to be entertained with regard to the substantial honesty of the transaction. It appears quite clear that the father, whose judgment-creditor obtained this property, was in insolvent circumstances; that he had not a farthing of money with which to purchase the

(1) 3 Moo. I. A., 229; see p. 240.

(2) 11 Moo. I. A., 28.

property in question ; that the property was then in the hands of a mortgagee, who had foreclosed and had become the absolute owner of the property, so that it was his to deal with as he thought fit. Having, probably, as was suggested by the High Court, kind considerations for the father and the family, he was minded not to insist on retaining the whole value of the property so acquired, but to allow it to go back to the family, on being satisfied, or secured in some way or other, the real amount of the debt for which he had seized the property. In that state of things the way in which the transaction was completed was this,—the son gets a man to lend him part of the money in consideration of a patni and a bond ; the son gives a mortgage to the original mortgagee for parting with the interest which he had obtained under the foreclosure ; he gives his bond and then the conveyance is made to the son. Their Lordships think, in accordance with the judgment of the High Court, that this was done for the benefit of the family. The whole circumstances show that it was open to the mortgagee and to the family to do it, not by a conveyance to the insolvent father, or in trust to the insolvent father, which would give it to the creditors, who had no right, equitable or moral, with regard to this property, but to give it in such a way as best to effect their object, that is, to give it to the son, who seems to have been the proper man to carry out the arrangement for himself and for his family.

Under these circumstances, their Lordships think that the judgment of the Principal Sudder Ameen was right ; and they will therefore humbly recommend to Her Majesty that the judgment of the High Court ought to be reversed, and that, in lieu thereof, there should be an order dismissing the appeal from the Sudder Ameen with costs.

The appellant is to have the costs of this appeal.

Judgment reversed.

Agents for appellant : Messrs. *Watkins and Latley*.

Agent for respondent : Mr. *Barrow*.

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P. C.*
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July. 15.

**MUNSHI AMIR ALI (PLAINTIFF) v. MAHARANI
INDERJIT KOER AND OTHERS (DEFENDANTS); AND
RAN BAHADUR SING AND OTHERS (PLAINTIFFS).**

**ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.**

*Appeal—Agreement not to appeal—Counsel—Costs—Sum given Nomine
Expensarum.*

Where the Counsel for the appellant had agreed, at the hearing of the case on appeal before the High Court, that, if the High Court would restrict its judgment to a finding on one of several issues, his client would not appeal to England: *Held* that that agreement was binding and that the appeal could not be heard.

Where an appeal is preferred contrary to an agreement not to appeal, application to stay the proceedings should be made before the case is prepared for hearing.

A fixed sum was given to each respondent *nomine expensarum*, in lieu of costs.

THIS was an appeal from a decision of the High Court (Peacock, CJ., Bayley and E. Jackson, JJ.), dated 12th June 1866 (1).

The suit was instituted in the name of Baboo Bislam Sing, Lal Narayan Sing, Deopati Narayan Sing, and the appellant, against the lady respondents, for the purpose of obtaining possession of a portion, and a declaration of right to another portion, of the estates belonging to the Ticaree raj. The three first plaintiffs claimed as heirs of Maharaja Mitterjit Sing; the appellant claimed a two-anna share as purchaser from the other plaintiffs.

The plaint, so far as baboo Bislam Sing was concerned, purported to be filed by his son Ran Bahadur Sing, and the authority so to file it depended upon the genuineness of a mooktearnama alleged to have been executed by Baboo Bislam Sing, on the 2nd December 1862, in favor of his two sons, Ran Bahadur and Murlidhur Sing. The title of the appellant depended upon a conveyance executed by these two sons under the

* *Present*:—THE RIGHT HON'BLE SIR JAMES W. COLVILLE, SIR R. PHILLIMORE, SIR JOSEPH NAPIER, LORD JUSTICE JAMES, LORD JUSTICE MELLISH, AND SIR LAWRENCE PEELE.

mooktearnama. The defendants impeached the mooktearnama as a forgery. Independently of the question as to the validity of the mooktearnama, many other points arose in the case, but the High Court having decided against the mooktearnama, the claim of the present appellant of course fell to the ground.

He thereupon obtained the ordinary leave to appeal to England; but as this was in breach of what had been agreed upon by his Counsel at the hearing of the appeal, the attention of the High Court was drawn to it, and the following certificate was accordingly sent by the High Court to the Privy Council Office :—

“ We hereby certify that, after deciding the point as to the validity of the mooktearnama, Mr. Paul, the Counsel for Munshi Amir Ali, one of the appellants, stated that, if the Court would confine its judgment to that point only, it was the intention of his client not to appeal to Her Majesty in Council. The Court, therefore, with the consent of both parties, abstained from pronouncing any judgment upon the other points in the case.

Finding that, notwithstanding what took place at the hearing before this Court, as above stated, Munshi Amir Ali had appealed to Her Majesty in Council, the Court called for an explanation. Mr. Paul now says that at the time when he made the statement he believed that he had the full authority of his client to make it, and that Munshi Amir Ali's son, who was managing the appeal on behalf of his father, was present in Court when that statement was made and consented to it.

We think it due to this Court and to the respondent that a certificate, as to the circumstances under which judgment was not pronounced upon all the points in the case, should be forwarded to Her Majesty in Council. We have therefore ordered the above certificate to be forwarded with the appeal to Her Majesty in Council.

(Sd.) B. PEACOCK.
 „ H. V. BAYLEY.
 „ E. JACKSON.”

The case came on for hearing in the ordinary course.

Mr. Leith for the appellant.

Sir R. Palmer, Q. C., and Mr. Doyne for the two first respondents.

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Mr. *J. D. Bell* for the third respondent.

Mr. *Doynes* for the fourth respondent.

The other respondents did not appear.

Mr. *Leith* was proceeding to contend that there had been a mis-carriage in not settling the issue as to the validity of the document, when the Counsel for the respondent took as a preliminary objection that this appeal was brought contrary to good faith, and could not be heard. Mr. *Leith* contended that there had been in fact no authority from the Munshi to abandon his right of appeal; and although Mr. Paul acted in good faith, he did so under a misapprehension as to the authority.

Their Lordships gave the following judgment:—

Their Lordships are of opinion that the preliminary objection taken to the hearing of this appeal ought to prevail. The certificate of the High Court of Fort William in Bengal is to the effect that, in consideration of the Court deciding the appeal before them upon one point only, that is, the validity of the mooktearnama, the Counsel for the appellant, in the presence and with the consent of the son and agent of the appellant, stated to the Court that he would not appeal from the decision as to the validity of the mooktearnama. Their Lordships upon consideration find that there was really very good and sufficient consideration for such an agreement on the part of Counsel, as part of the conduct of the case, because the result was this,—and a very important result to the parties,—that, by obtaining the decision upon the validity of the mooktearnama alone, the case became a case not decided against Bishen Sing, the party in whose right the appellant was suing. If the case had been heard by the High Court, and, upon appeal, the merits had been gone into, and the whole matter determined upon, as in a suit by Bishen Sing and others, Bishen Sing and the persons claiming under him would not have been precluded from appealing to this Court, but might, on the other hand, have had two successive decisions against them upon questions of fact going to the merits of the case. But confining it to the decision upon the mooktearnama, it was really substituting a nonsuit for an adverse verdict, leaving it

open to Bishen Sing and the appellant himself, if he can get a new and genuine document in his favor, to bring a fresh suit. That being so, it was clearly a valid agreement on the part of Counsel not to appeal; and there is no doubt that it was done with the actual consent of the son and representative of the appellant. The appeal is brought in violation of good faith, and their Lordships feel that they ought not to entertain an appeal so brought, where the real merits of the case have been withdrawn from the Court below.

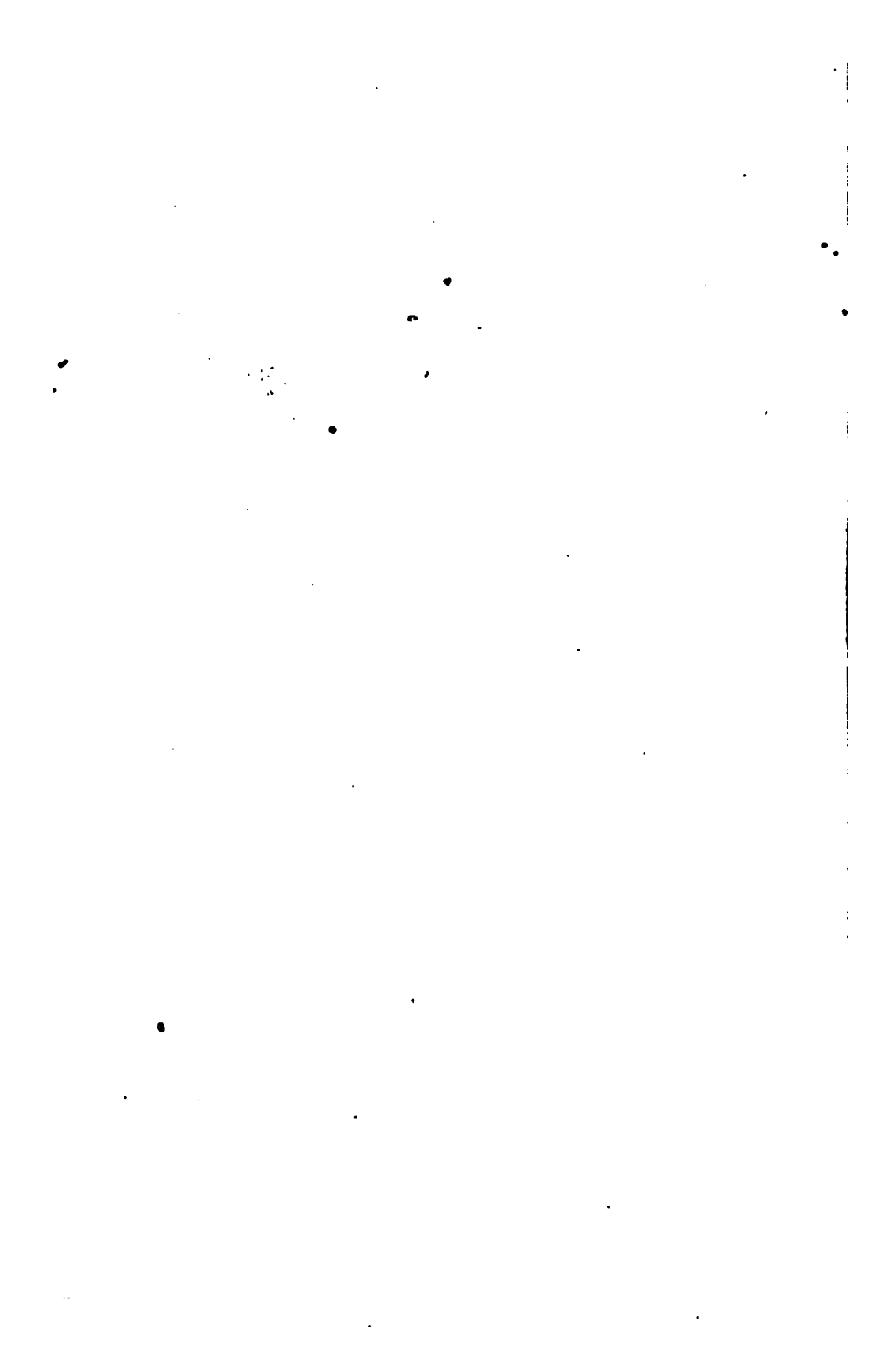
But their Lordships have had some difficulty in determining what should be done with regard to costs. Now their Lordships feel that, where a certificate of this kind comes over with the record, and must, therefore, be known to both parties, it was the duty of each party to have made an application to the Registrar, who would at once have brought the matter to the attention of their Lordships, and taken their Lordships' directions as to what ought to be done with a record so situated before any expense had been incurred in preparing cases, or in delivering briefs for the hearing. It was wrong of both parties to proceed with an expensive litigation in the face of this certificate, without its being brought, either through the Registrar or by an application at their Lordships' bar, to their attention. Disposing of it upon this preliminary, but still very serious, objection, their Lordships feel that they ought not to give all the costs, as if the case had been fully heard upon the appeal, but still they think the appellant ought not to escape a very considerable portion of the costs which have been incurred. They think, therefore, that this is a case in which they may use the power with which they are invested, to give a sum of money *nomine expensarum*, and, therefore, they will humbly recommend Her Majesty to dismiss the appeal, allowing to each of the three respondents the sum of fifty guineas for the costs of the dismissal of the appeal.

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Appeal dismissed.

Agent for appellant; Mr. Wilson.

Agents for the several respondents: Messrs J. H. and H. R. Henderson, Messrs. Watkins and Lattey, and Mr. Barrow,



APPENDIX.



APPENDIX.

Before Mr. Justice Kemp and Mr. Justice Glover.

**HARI MOHAN BYSAK AND ANOTHER (DEFENDANTS) v. KRISHNA
MOHAN BYSAK AND ANOTHER (PLAINTIFFS).***

1873
March 5.

Hundi—Custom—Drawer, Agent of Acceptor—Dishonor.

The drawers of a hundi in favor of the plaintiff at Dacca (where all the parties to the hundi lived) were held not liable on proof that they were the gomastas of the acceptor, that they had no interest in the hundi, and that, according to custom in Dacca where the hundi was drawn and accepted, agents under such circumstances are not liable, although the agency does not appear on the hundi. They were also held discharged from liability, notice of dishonor not having been served on them till ten months after the due date of the hundi.

In this case a hundi for Rs. 1,000, dated the 19th April 1869, was drawn in favor of the plaintiffs by Hari Mohan Bysak and Ramoharan Pal, and accepted by Sham Sundar Bysak, payable sixty days after date, i. e., on the 18th June. Some months after the hundi fell due, the acceptor paid the drawees in two instalments, Rs. 400, and afterwards became insolvent. The drawees alleged that, ten months after the bill became due, they gave notice to the drawers, and to the acceptor that, unless the balance, Rs. 600, was paid within two days, an action would be instituted against them for the amount. The plaintiffs brought the present action against the acceptor (defendant No. 1) and the drawers (defendants No. 2), for the amount.

The defence of the drawers was that they drew the hundi as agents of the acceptor, and therefore, according to a mercantile usage prevalent in Dacca, were not liable; the usage being for agents to draw hundis on their principals without disclosing the fact in the hundi, and that on proof of such agency, the drawer was not liable; that they were neither partners nor commission agents of the acceptor, but his servants on salaries of Rs. 6 and 8 per month respectively; that the payees, having given time to the acceptor, could not now make them, the drawees, liable, and that no notice of dishonor was served on them. The acceptor did not enter appearance.

The hundi was in the usual form, and it did not appear on the face of it whether the drawers signed as servants or gomastas of the acceptor, but

*Special Appeal, No. 793 of 1871, from a decree of the Judge of Dacca, dated the 22nd April 1871, reversing a decree of the Subordinate Judge of that district, dated the 8th November 1870.

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But there is also, we think, another point on which the defendants (appellants) are entitled to succeed in this appeal. It is quite clear that the plaintiffs (the drawees) considered the defendant Sham Sundar Bysak as their only debtor; they received part payment of the hundi from him and gave him time in which to pay the remainder, and under ordinary circumstances this alone would excuse the drawers from liability, because they were entitled to receive notice at the very first of Sham Sundar's failure to pay the money; and if they did not receive that notice, they would, according to the ordinary rule of law, not be bound to make arrangements for the payment of the hundi; and as to the notice itself the law is that notice shall be sent to the drawer of the bill at the time dishonor takes place. In this case the bill fell due on the 5th of Asar 1276 (18th June 1860), whereas no notice of its having been dishonored, was sent to the defendants, drawers of the bill, till ten months after, or in Jaishta (May) of the following year. On the whole we think that the plaintiffs never considered the defendants (drawers of the hundi) as their debtors, and that they knew, as every body else must have known, all the parties living in the same town of Dacca, that these two men were ordinary servants of Sham Sundar Bysak, and only drew this hundi in the common discharge of their duties as gomastas, and there cannot be the slightest doubt that the plaintiffs looked to Sham Sundar, and to Sham Sundar alone, as the person from whom they were entitled to recover their money.

Under these circumstances, we think that the decree of the Judge as against the appellants, defendants 2 and 3, is wrong, and must be reversed. This appeal, is therefore decreed with costs payable by the plaintiffs, respondents. The decree of the Judge against the defendant No. 1, Sham Sundar Bysak, will stand.

Before Mr. Justice Macpherson.

BHIM DAS v. UPENDRA MOHAN TAGORE.

1872
June 14.

Will, Construction of—"Domestic Servant."

Suit against the executors of the will of Prasanna Kumar Tagore to recover Rs. 1,731-8 to which the plaintiff alleged he was entitled under a clause in the will, by which the testator gave and bequeathed to each of his domestic servants in Calcutta, who should have been in his service ten years and upwards at the time of his death, Rs. 100 for every rupee of monthly salary drawn by them, from the testator, respectively.

The plaintiff stated in his plaint that he was a washerman by caste and profession, and that in 1845 he had been engaged by the testator as one of his servants at a monthly salary of Rs. 15, and had continued in the testator's actual and constant service down to the date of the testator's death, being a period of about twenty-five years. He further alleged that, during the time he was in the service of the testator, his principal duty was to wash the testator's clothes, and those of his family and establishment at Calcutta; that he

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the direction of the testator, he was in the habit of carrying the dirty clothes every week to Kurdah, where his own house was situated; and that, having washed them there, he brought them back to be ironed at the testator's usual place of residence in Calcutta, spending two or three days at Kurdah, and the remainder of the week at the testator's residence; that while at Kurdah he lived in his own house and at his own expense, but that in Calcutta he lived in the testator's residence, and got his meals at the testator's expense, and the tools required by him for his work were supplied to him by the testator; that, besides his duties as a washerman, he, when not actually engaged in his own work, was required by the testator to, and he did make himself generally useful at the testator's residence; that, in or about the year 1855, the family of the testator's daughters having increased, the testator made a settlement upon them, and separated his own domestic establishment from theirs; that the testator's daughters having desired to retain the plaintiff's services as their washerman, the testator consented to his acting for the testator's daughters upon separate pay; and that, after such consent, he worked both for the testator and the testator's daughters, but that his acting for the daughters did not interfere with the arrangement and routine of his work for the testator. He further stated that he was not allowed to, and did not in fact hire himself out as a washerman or in any other capacity whatsoever to any other person or persons.

The defendants, while admitting assets sufficient to pay the legacy, disputed the plaintiff's right on the ground that he had not worked solely for the testator; but had hired himself out as washerman to persons other than the testator, and that he did not live in the testator's house as alleged in the plaint.

The evidence on behalf of the plaintiff failed to prove the case as stated, and bore out the defendant's allegations.

Mr. Bonnerjee (Mr. Kennedy with him) for the plaintiff.

Mr. Phillips for the defendant.

MACPHERSON, J., expressed an opinion that, if the case had been proved, as laid in the plaint, the plaintiff would have been clearly entitled to recover but the evidence having failed to prove that case, his Lordship dismissed the suit without costs as against the plaintiff. The defendant's costs to come out of the estate.

Suit dismissed (1).

Attorney for the plaintiff: Baboo T. B. Chatterjee.

Attorney for the defendants: Mr. Hatch.

(1) See in *Vithoba Malkhari v. Corfield*, 3 Bom. H. C., App. 1, per Yardley, C. J. at p. 21, and per Jackson, J., at p. 26.

Before Mr. Justice Macpherson.

P. v. P.

1872
June 6 & 17.

Attorney—Application by Attorney for Withdrawal or Dismissal of suit for Judicial Separation and for payment of his taxed Costs by Respondent.

On the 8th of January 1872 the petitioner A. L. P. instituted a suit for judicial separation against her husband, on the ground of his cruelty and desertion.

The respondent in his written statement denied the allegations of cruelty and desertion. He stated that the petitioner had left his house of her own accord, and that he had refused afterwards to take her back on finding that she was leading an immoral life. He further stated that, before his alleged marriage with the petitioner, she had represented herself to be a widow, but that he had subsequently discovered that her former husband M. M. was still alive.

On the 29th January an order for alimony *pendente lite*, and for deposit of the petitioner's costs of suit was made against the respondent; and on the 11th March he applied to be allowed to give security for the due payment of the costs, instead of depositing their amount in Court: this application was dismissed. On the 15th March, the respondent having failed to deposit the petitioner's costs in Court, a rule was obtained calling upon him to show cause why an attachment should not issue against him; and on the same day the respondent obtained leave to file a further written statement, and it was ordered that a commission should issue to examine M. M., upon the respondent's paying into Court the petitioner's costs of the said commission and of the application therefor, and, pending the return of the commission, the respondent was ordered to give security for the costs which, on the 29th January, he had been ordered to deposit in Court. The respondent's attorneys took no further proceedings on this order: and on the 28th March Mr. H. R. Fink, the attorney on the record for the petitioner, learned that she had returned to, and was living with, the respondent, and that the suit had been amicably settled.

Mr. Bonnerjee, on behalf of Mr. Fink, now moved upon notice to the petitioner, the respondent, and the respondent's attorneys, for an order that the suit be dismissed or withdrawn; that the petitioner's costs as between attorney and client be taxed; and that the respondent do pay such taxed costs to Mr. Fink as the attorney on record for the petitioner. The motion was based upon the pleadings, and the several orders made in the suit, and upon an affidavit of Mr. Fink in which, after stating that he had been retained by the petitioner, and had instituted the suit on her behalf and under her instructions, and after setting out the proceedings and orders made thereupon, and further stating that the parties had returned to cohabitation, and that the suit had been amicably

settled, he alleged that, on the 10th of April, the petitioner called on him, and instructed him to withdraw the suit, saying that her husband would pay all her costs, and that he had accordingly prepared a petition in terms of these instructions, and sent it to the respondent's attorneys, but that they had returned it to him on 24th April, with a statement that they could not sign it. He then alleged that no final order in the suit having been made, he was unable to tax his costs, and that to the best of his information and belief, the petitioner had no separate property of her own.

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Mr. Bonnerjee, stating that he moved on behalf of the petitioner, contended that, although the Divorce Act contains no provision as to costs, by s. 45, the Civil Procedure Code is embodied with the Act, the Court therefore, has power to deal with the question of costs. The attorney has such an interest in the suit as will entitle him to the order; for till the suit is dismissed or withdrawn, his costs cannot be taxed. The application is correct in form—*Cheale v. Cheale* (1). [MACPHERSON, J.—Neither the respondent nor the petitioner apply to have the suit dismissed. I could understand your moving on behalf of the attorney, but you said that you moved on the petitioner's behalf, and you call upon her to show cause]. The petitioner has not withdrawn her instructions, but, in point of fact, the motion is on behalf of her attorney. The Court has power to make this order—*Cooper v. Cooper* (2). The element which was wanting in that case is not wanting here, for we had an order that the respondent should furnish security.

Mr. Macrae for the respondent.—An attorney can come in and ask that his costs may be taxed, but he cannot ask that the suit shall be withdrawn or dismissed. Limiting myself, therefore, to that portion of the motion which asks for an order that the respondent do pay his wife's costs, I submit that, on the pleadings before the Court, there is sufficient to show there were circumstances of grave suspicion in the case which ought to have put the attorney on enquiry. See the judgment of Knight Bruce, L. J., in *Baylis v. Watkins* (3). [MACPHERSON, J.—You can only say that the petitioner made certain charges which she has now condoned; nothing more appears]. It is said that in England the wife was considered entitled to her costs in any event, but this is not so—*Jones v. Jones* (4) and *Lewis v. Lewis* (5). There are, indeed, cases in which a wife who has separate property has been made to pay her husband's costs. It is true that in the Divorce Court the wife does generally obtain her costs, whether successful or not, but this is an anomaly which this Court will discountenance, unless it is bound by precedent, and the cases cited show that it is not so bound. To saddle the husband with the costs of a suit which the

(1) 1 Hagg. Ecc., 374.

(2) 3 Sw. & Tr., 392.

(3) 2 DeG., J. & S., 91.

(4) L. R., 2 P. & D., 333,

(5) 29 L. J., P. & M., 123.

1872 wife has brought under the advice of a speculative attorney, for acts which she has condoned, would be a hardship and imposition.

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Mr. Bonnerjee in reply

MACPHERSON, J.—Supposing the application to be regularly made (i.e., by the petitioner moving to withdraw the suit, and that the respondent do pay her costs), I should act as the Judge Ordinary did in *Cooper v. Cooper* (1). That case is very similar in many respects to the present; and I see no reason to doubt that the petitioner's costs might, as the case proceeded, have been taxed *de die in diem* if the petitioner had so applied.

It is said that the facts appearing on the pleadings and affidavits which have been filed are such as show great negligence, amounting to want of ordinary care, if not to something more, on the part of the petitioner's attorney. And it is argued that the case is groundless, and that, under the circumstances, the respondent ought in no circumstances to be made to pay the petitioner's costs; but without going into evidence,—the same evidence almost as would be necessary if the case went on to a regular hearing,—I cannot adjudicate upon the question of the truth or falsehood of the various allegations of the parties. It is true that the respondent says that the petitioner has committed bigamy, and that he seems to have substantial grounds for so saying. But it is not proved that she has done so; and the respondent does not profess to intend to proceed to prove it. The petitioner in her petition, which is verified, states that she was legally married to the respondent, and there is no doubt that she did go through the marriage ceremony with him. That being so, and in the absence of any indication that the petitioner's attorney had any knowledge of her being already the wife of another man, or that there was any reason why he should suspect her of having committed bigamy, I cannot say that I think Mr. Fink was guilty of negligence, so far as the question of bigamy is concerned, in making no special inquiries on that point before he filed the petition. There being no suggestion to the contrary, I do not wonder that he rested satisfied with her statement, true in fact, that she had been married recently to the respondent.

There is no doubt that the petitioner comes before the Court under exceptionally discreditable circumstances as regards her antecedents, taking her story as she herself tells it in her written statement; and it is possible, not to say probable, that, if the matter had gone on to a hearing, the respondent would not have been ordered to pay her costs. But the parties have chosen to return to cohabitation, and so prevent the further progress of the suit. That being so, and looking at all the circumstances, I think that the attorney is entitled to an order that his costs when taxed be paid by the respondent.

But the respondent will not have to pay the costs of this application, which in form is entirely irregular and wrong. Mr. Fink in his affidavit states that, on

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the 15th of March, the petitioner obtained a rule against the respondent to show cause why an attachment should not issue for non-compliance with an order which had been made, that he should deposit in Court Rs. 1,500 to meet the petitioner's costs; that immediately thereafter the Court ordered the issue of a commission to England to take evidence as to the bigamy, and that, pending the return of the commission, the respondent should give security for the probable amount of the petitioner's costs, with liberty to the petitioner to apply for the deposit of those costs on the return of the commission from England; that no further proceedings were taken; and that on the 28th March he (Mr. Fink) was informed that the petitioner had gone back to live with the respondent, and that the suit was amicably settled. Mr. Fink then states that on the 10th of April the petitioner called on him and instructed him to withdraw the suit, saying that the respondent would pay all her costs; that he accordingly prepared a petition in terms of these instructions, and sent it to the respondent's attorneys for their consent, but they returned the same on the 24th April, and refused to consent.

On this state of facts, Mr. Fink, on the 29th May, of issued a notice to his own client the petitioner in the suit, to the respondent and to the respondent's attorneys, to the effect that he will apply in chambers for an order that the suit be dismissed or withdrawn, and that the respondent do pay him, as the attorney on the record for the petitioner, the amount of her costs when taxed. Mr. Fink was quite wrong in coming to the Court in this manner, asking for an order as against his own client. He ought either to have made an application to the Court in the terms of the instructions received from the petitioner on April 10th or, if for any reason he thought he could no longer act on those instructions, he should have again communicated with his client, and have ascertained expressly her intentions and wishes. After having ascertained her wishes, he might then have made such application to the Court as was necessary. Coming in, however, as he does on his own account, and adversely to both parties, no order for the withdrawal or other final disposal of the suit can be made, and the parties will have to come again before the Court, and be put to further expense before the suit can be finally disposed of; whereas, if the matter had been moved in proper form, the suit might have been finally concluded now.

Therefore, although I shall order the petitioner's costs to be taxed and to be paid by the respondent to her attorney (he being substantially entitled to such an order), her attorney must personally bear his own costs of this application.

The petitioner's costs will be taxed on scale No. 2.

Before Mr. Justice Macpherson.

1872
June 27 & 28. IN THE MATTER OF A PLAINT, No. 32 of 1872, FILED IN THE COURT OF THE SUBORDINATE JUDGE OF ZILLA TIPPERAH AT COMILLAH, WHEREIN EUGENE JOSEPH COURJON IS PLAINTIFF AND ALFRED COURJON IS DEFENDANT.

10 B.L.R. 67. Removal of Suit from Mofussil Court—Letters Patent, 1865, c. 13—Practice—Using Affidavit on omission.

Motion to remove a suit pending in the Court of the Judge of Zilla Tipperah to the High Court.

The motion was supported by an affidavit of Mr. J. B. Knowles, a member of the firm of Messrs. Chauntrell, Knowles and Roberts, the plaintiff's attorneys. Mr. Knowles therein stated amongst other things that the suit was to set aside a patni and dar-patni lease executed by the plaintiff, on the 3rd of December 1866, in favor of the defendant, of the plaintiff's share in various estates and landed property situate principally in Zilla Tipperah, to recover mesne profits, for an account, and for the appointment of a receiver; that the plaintiff also sought to set aside an izara, or lease, dated the 22nd of April 1863 of the same properties, and for possession thereof; that the money value of the plaintiff's claim was laid at Rs. 11,81,226-4-6; that the ground of the plaintiff's case was fraud, undue influence, ignorance and concealment of value of the plaintiff's interest; that the defendant had applied to the Judge of the District of Tipperah to transfer the case to his own Court on the ground (*inter alia*) that the suit involved questions of French and English law of considerable difficulty; and that the suit had been so transferred. Mr. Knowles further stated that he was informed and believed that the plaintiff and defendant were both sons of one Farge Courjon, who in his will described himself as a French subject by birth; that the defendant resided at Chandernagore, a French settlement, not subject to the jurisdiction of the British Government or of the Civil Courts in British India; that the plaintiff was in Paris when the patni sought to be set aside was executed; that the defendant had been there recently; and that questions as to the *status* and domicile of the parties, and as to the applicability of French law, might arise in the suit; that the patni sought to be set aside was prepared, revised, and executed at Calcutta, and that it would probably be necessary to take the evidence of the solicitors and agents there of the parties, who prepared, revised, and executed such patni; that the defendant and his chief witness possessed very large estates, and commanded great influence in and around the District of Tipperah, and that he, Mr. Knowles, was informed and believed that the plaintiff's case might be prejudiced in consequence of such influence; that he was informed and believed that the defendant had engaged all the pleaders practising in the District and Subordinate Courts of Tipperah, with the exception of one, who had refused to accept his retainer. The affidavit further alleged as reasons, for

the removal of the case, the length, difficulty, and danger of the journey to Tipperah; the difficulty, if not impossibility of obtaining evidence there on the questions of French law, suggested by the defendant as likely to arise in the case; the novelty of such questions, and of other intricate questions of law likely to arise in the case, to a Judge of any other Court than the High Court; the absence of experienced Counsel; and the fact that, owing to the procedure in Mofussil Courts, translations in Bengali of the plaint, and other documents in the case had to be filed.

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v.
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The defendant, in an affidavit filed in answer to the affidavit of Mr. Knowles, admitted that he and the plaintiff were both sons of Farge Courjon, but stated that his father, instead of describing himself in his will as a French subject by birth, had said that, although a French subject by birth, he had lost his quality of Frenchman under the French Civil Code, by having, without authority from the French Government, held public office under the British Government in India, and by reason of having settled in British India without any intention of returning to France, or to any French dependencies. He further admitted that the patni which the plaintiff sought to set aside had been prepared, revised, and executed in Calcutta. The defendant denied the allegations in Mr. Knowles' affidavit as to his having large estates in and around the District of Tipperah, as to his having engaged all the pleaders practising in the Tipperah Courts, and as to the difficulty and danger of the journey to Tipperah; and he stated that the only question really at issue between the plaintiff and himself was whether he had obtained the izara and patni leases of certain zemindaries by fraud.

Mr. Kennedy and Mr. Reily for the plaintiff.

Mr. Woodroffe and Mr. Fergusson for the defendant.

Mr. Kennedy, after referring to the facts of the case as stated in the plaint and reading the affidavit of Mr. Knowles, requested the Court's permission to read on affidavit of the plaintiff himself, filed after the day mentioned in the notice to the defendant and his attorneys as that upon which the motion would be made; and pending an adjournment which had been granted for Mr. Kennedy's convenience; he also proposed to use and rely on a certain appeal and proceedings in regular appeal wherein the defendant had been appellant, and which were not mentioned as grounds of motion in the original notice.

Mr. Woodroffe objected.

MACPHERSON, J., refused to allow the plaintiff's affidavit or the appeal proceedings to be read without the consent of the other side.

Mr. Kennedy then contended that the affidavit of Mr. Knowles disclosed sufficient grounds for the removal of the case. If questions of French law were to

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arise, as the defendant says they are likely to do, it will be less difficult to obtain the evidence of experts in Calcutta than at Tipperah, we do not suggest that such questions can arise, there will, therefore, be a dispute as to the applicability of French law. Then there is the question of domicile which cannot be tried according to the principles laid down in the Succession Act, since that Act was enacted long after the death of Farge Courjon under whose will the plaintiff obtained the property, the subject of the leases. Those leases were executed in Calcutta, and it was there that the fraud and concealment complained of took place. Having regard to the relationship of the plaintiff and defendant, a point may arise as to the legal position of a lately emancipated minor with respect to his guardian. The grounds for removing this case are far stronger than they were in the case of *Doucett v. Wiss* (1), which was removed for trial in the High Court by Morgan, J. In the only reported case I can find in which an order of removal was refused, namely *Raja Ojooderam Khan v. S. M. Nabinmoney Dosses* (6), Markby, J., held that the mere fact that it would be less expensive to try the case in the High Court, is not sufficient of itself to justify a transfer, but it is doubtful whether the rule there laid down does not reduce the power of this Court within too narrow limits, and it is submitted that, when it is clearly proved that the expense would be less, and the convenience to witnesses greater in case of a trial here, that would be a sufficient ground of removal. If the case is tried at Tipperah, and appealed to the High Court there is the possibility—by no means remote—of the loss of documents during transit. The influence of the defendant at Tipperah, the importance and difficulty of the legal questions involved, the absence of a trained Judge, of an experienced Bar, and of an extensive law library, all point to an unsatisfactory trial at Tipperah, and are cogent reasons for the removal of the case.

Mr. Woodroffe, contra.—No points of French or English law are involved. The leases are sought to be set aside on the ground of the defendant's fraud; the charge amounts to one of misrepresentation of the value of the property and evidence as to that value is best available on the spot. In *Doucett v. Wiss* (3), the Court in remanding the case said:—"This case appears to be one in which an application to this Court may fitly be made under the 13th section of the Charter," but no reason is assigned for that recommendation. Norman, J., refused to remove the case of *Borradaile v. Gregory* (4).

Mr. Kennedy in reply.

MACPHERSON, J.—It appears to me that there is no reason to suppose that any very specially difficult questions of law will arise in this case. As to the

(1) 1 Ind. Jur., 94.

(2) *Ib.*, 396.

(3) 2 Ind. Jur., 280.

(4) *Bourke, Ex. J.* 3.

other matters complained of, they are little more than ordinary incidents of all hotly contested Mofussil cases, I therefore refuse the application to transfer the case to this Court. As to costs, the reason why I refuse them to the defendant is, that it was he who in the first instance started the idea of there being intricate questions of English and French law which would have to be decided in the suit. I may add that many reckless statements have been made on both sides without much regard to truth.

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Before Mr. Justice E. Jackson and Mr. Justice Mitter.

MAHARAJA DHIRAJ MAHATAB CHAND BAHADUR (PLAINTIFF) v. MA
KUND BALLABH BOSE AND OTHERS (DEFENDANT).*

1870
Aug. 18.

Suit for Rent of Land with Buildings—Jurisdiction of Revenue Court.

The Revenue Courts have no jurisdiction to entertain a suit for rent of land with buildings upon it, when the rent includes the rent of the buildings, as well as of the land.

Baboo Chandra Madhad Ghose for the appellant.

Baboo Mahendra Lal Seal for the respondents.

THE judgment of the Court was delivered by

JACKSON, J.—This was a suit for arrears of rent. The question before both the lower Courts seems to have been whether the jurisdiction to try the suit was in the Civil Court, or was in the Revenue Court. Both the lower Courts have come to the conclusion that the jurisdiction was with the Revenue Court, and have dismissed the suit of the plaintiff from hearing in the Civil Court. On special appeal to us, it is argued that this decision is wrong, and that the jurisdiction at the time this plaint was preferred was in the Civil Court.

It would not have been necessary to try this point now, as, whether the jurisdiction was in the one Court or the other, the jurisdiction is now in the Civil Court: but as the question has been pressed upon us in connexion with the matter of costs, it becomes necessary to decide whether, at the time this plaint was put in, it was entertainable in the Civil Court or not.

The mehals leased appear to consist of two large bazars in the town of Burdwan. One of them is the Chandee bazar, close to the Maharajah's palace. The kabuliati is put in. From this kabuliati, it is quite clear that not only is the land leased, but also the buildings in the bazar are leased.

* Special Appeal, No. 151 of 1870, from a decree of the Judge of East Burdwan, dated the 18th May 1869, affirming a decree of the Subordinate Judge of that district, dated the 11th December 1868.

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MAHARAJA
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BOSE.

The rent which is assessed does not issue only out of the land, but also out of the buildings; and, in fact, in the case of a bazar like this, it must issue principally out of the buildings.

One case which was quoted by the respondents' vakeel before us, in order to fortify his argument, is directly against him, namely, the decision in the case of *Tariny Prasad Ghose v. The Bengal Indigo Co.* (1). That was a case in which the land had been leased for certain indigo manufacturing purposes. Factories had subsequently been built upon the land, and a suit regarding rent had been brought, and it was attempted to be contended that, as factories were situated upon the land, the suit could not be brought in the Revenue Courts; but was held that, as the lease was not for the factory, but only for the land, the suit would lie in the Revenue Courts. Had, however, the lease been for the factory, as well as the land, the suit could not have been preferred in the Revenue Court. The decision is directly against the argument of the respondents' pleader. I quite concur in that decision, and I understand that that decision has been followed generally in this Court for some years past.

The rent which is demanded in this case not being solely for the land, but also for the buildings, it appears to me that the suit does not lie in the Revenue Court, and that the lower Courts are wrong in deciding to that effect. The decision of the lower Courts must be set aside, and the case must be remanded to the first Court for trial. The respondent must pay the costs of all the Courts.

1870
Dec. 7.

Before Mr. Justice H. Jackson and Mr. Justice Mookerjee.

HARI MOHAN SIKKAR AND OTHERS (DEFENDANTS) v. B. SCOTT
MONOBIEFF (PLAINTIFF).*

Suit for Rent of Lands on which are Arhats, Ghats and Bazars—jurisdiction of Revenue Court—Act X of 1859.

A suit for rent of lands where the rent comes from arhats, ghats, and bazars situated upon it, as well as from the land, will not lie in the Revenue Court.

Mr. R. E. Twidale for the appellants.

Mr. R. T. Allan and Baboo Bhanani Charan Dutt for the respondent.

The judgment of the Court was delivered by

JACKSON, J.—This is a suit for two months' rent of forty-six bigas of land, and of certain arhats, ghats, hats, and bazars thereon, in Mauza

(1) 2 W. R., Act X R., 9.

* Special appeal No. 1341 of 1870, from a decree of the Additional Judge of Nuddea, dated the 9th May 1870, reversing a decree of the Deputy Collector of the district, dated the 5th April 1869.

Kennypore, near the town of Kooashta. The lower Courts have come to opposite conclusions as regards the points which were raised before them, namely, as to whether the defendant was entitled to an abatement of rent or not. On special appeal in this Court, we are asked to set aside the decision of the lower Appellate Court, on the ground that the Revenue Court in which this case was instituted had no jurisdiction to receive the plaint. Under the precedents of this Court, the Revenue Courts have no jurisdiction to entertain suits like the one before us. The rent under the lease does not come from the land, but the rent comes from the *arhats* and from the *ghats* and from the *basars*, as well as from the land, which explains the fact that forty-six bigas are let out at the rent of Rs. 5,000 annually. The case seems to be on all fours with the cases of *Maharaja Dhiraj Mahatab Chand Bahadur v. Mahund Ballabh Bose* (1), *Kali Mohan Chatterjee v. Kali Krishna Roy Chowdhry* (2), *Kali Kishen Biswas v. Sreemutty Jankee* (3), *Shalgram v. Mussamat Kubi-run* (4), and *Ranee Shurne Moyee v. Blumhardt* (5), in which it has been held that such suits do not form the subject of Act X of 1859; they must be brought in Civil Courts. However reluctant we may feel to remand this case still, following those precedents, we think we are obliged to set aside the decision of the Judge, and direct that the suit may be brought in the proper Court. The costs of the appeal, as far as it has gone, will be borne by the parties respectively, inasmuch as no such objection was raised in any of the lower Courts.

The decision of the Judge is set aside, and the plaintiff's suit is dismissed.

Before Mr. Justice Markby.

T. G. NEWTON AND OTHERS v. KURNEEDHONE AND OTHERS.

*Civil Procedure—Act VIII of 1859, s. 111—Non-appearance of Defendant—
Adjourned Hearing—Costs.*

1872
July 11.

This case had been placed on the list of undefended causes in consequence of the non-appearance of the defendant, and the hearing had been adjourned, at the instance of the plaintiff, to a subsequent day. On that day, upon the case being called in its order, Mr. Lowe appeared for the defendant.

Mr. Phillips, on behalf of the plaintiff, contended that, by s. 111, Act VIII of 1859, the defendant could not be heard in answer to the suit until he had shown good cause for his previous non-appearance. [MARKBY, J.—Does not that section apply only to cases in which the suit has been partly heard?] There was a part hearing on the day on which the adjournment was made. The record will show that the plaintiff appeared on that day, and that

(1) *Ante*, App., 13.

(2) 2 B. L. R., App., 39.

(3) 8 W. R., 250.

(4) 3 B. L. R., A. C., 61.

(5) 9 W. R., 552.

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KURNEED-
HONE.

the defendant did not appear. [MARKEBY, J.—Under a strict interpretation of the Procedure Code, I should say the defendant can appeal as a matter of right.] If the Court is bound to allow the defendant to defend the case, it has power to put him upon terms, and I would ask for a postponement, and that he should be ordered to file a written statement, and that the costs of the postponement should be borne by him. [MARKEBY, J.—I think there must be costs in the cause.]

Order accordingly

Before Mr. Justice Kemp and Mr. Justice Glover.

QUEEN v. RAM PANDA AND ANOTHER.*

Penal Code (Act XLV of 1860), ss. 108, 109, and 211.—Giving Evidence in Support of a False Charge—Abetment of such Charge.

A person cannot be convicted of abetment of a false charge, solely on the ground of his having given evidence in support of such charge.

THE Assistant Magistrate of Bhuddruck convicted two persons, Ram Panda and Dutt Hari Ghose, as abettors of a false charge, solely on the ground that they gave evidence in support of a charge brought by one Saraswati against her husband, which he (the Assistant Magistrate) had found in a prosecution against Saraswati and others under s. 211 of the Penal Code to be false, and sentenced them under s. 109 of that Code to periods of imprisonment below one month.

1872.
July. 11

The Sessions Judge of Cuttack referred the proceedings of the Assistant Magistrate to the High Court, under s. 434 of the Criminal Procedure Code, for the purpose of having the sentence and conviction quashed as being illegal. The Sessions Judge, in his letter of reference, made the following observations:—

"After careful consideration, I hold that s. 108 does not contemplate any acts of subsequent abetment, and that the Code does not provide for the punishment of such offences, except when they are such as are defined in ss. 212 to 218 of Chapter XI of the Indian Penal Code.

Many very excellent reasons could be assigned for this apparent, though not real, omission. It will, however, suffice for the purposes of this reference to point out that, if the inferior and theoretically less experienced Criminal Courts were allowed to punish as abettors persons who gave evidence in support of false charges, or rather charges found by the said Courts to be false, the provisions of the Procedure Code by which the punishment of the crime of false evidence can only be inflicted by the Sessions Court would be practically neutralized and set at naught. It is, I think, obvious that this was

*Reference to the High Court, under s. 434 of the Code of Criminal Procedure by the Sessions Judge of Cuttack.

never intended, and that the framers of the Criminal Procedure Code, although they allowed the lower Criminal Courts to punish for false charges, never vested them with authority to punish those who supported such charges, not by previous acts, but by evidence merely."

1872
 QUEEN
 v.
 RAM PANDA.

The judgment of the High Court was delivered by

KEMP, J.—We concur with the Sessions Judge. The conviction and sentence are set aside.

Before Mr. Justice Macpherson.

HIRALAL SEAL AND OTHERS v. A. CARAPIET.

Surety—Execution—Act VIII of 1859, s. 204.

1872
 June 27-29.

THIS was an application against one Radhakrishna Sett for execution under s. 204 of Act VIII of 1859. It appeared that a suit had been instituted by A. Carapiet against Hiralal Seal and others in the District Court of Hooghly; that it had been dismissed with costs; that the plaintiff had appealed to the High Court from the decision of the Judge of Hooghly; that pending the appeal, Hiralal Seal and his co-defendants had applied for and obtained an order from the High Court calling upon Carapiet to give security for his costs in the Court below and of the appeal; that Radhakrishna Sett had, in pursuance of the order, charged his house in Calcutta with the payment of the costs to the extent of Rs. 2,000; that the appeal to the High Court was dismissed with costs; that the costs of the Court below and of the appeal amounted to Rs. 2,052-7-6; and that the present applicants had been unable to realise the costs by execution within the jurisdiction of the Hooghly Court. They now applied for execution against Radhakrishna Sett by the attachment and sale of the house charged by him with the payment of Rs. 2,000.

Mr. Bonnerjee for the applicants.—S. 204 was at one time thought to be restricted to sureties under s. 76 or s. 83, and not to apply to sureties after decree like Radhakrishna Sett—*Baboo Ram Kishen Doss v. Hurkoo Singh* (1). But this view has been departed from. See *Akhut Ramana v. Ahmed Yousaffji* (2). At any rate this case is distinguishable from *Baboo Ramkishen Doss*' case (1), for there the arrangement was entered into after the case had finally terminated. *Akhut Ramana*'s case (2) is on all fours with this, and the applicants are entitled to execution.

MACPHERSON, J., made the order for execution as prayed (3).

(1) 7 W. R., 329.

(2) 7 B. L. R., 81

(3) See *Abdul Karim v. Abdul Huque Kasi*, 8 B. L. R. 205.

Before Mr. Justice Kemp and Mr. Justice Glover.

*In re KALI CHARAN CHUND (PETITIONER).**

1872
July 5.

Act XX of 1865, ss. 11 and 13—Meaning of the word "Practise"—Mookhtar.

The writing a petition for a party who presents it in Court is not acting as a Mookhtar within the meaning of s. 11, Act XX of 1865; and the writer is not liable to punishment under s. 13 for practising as a Mookhtar without a certificate.

ONE Kali Charan Chund drew and wrote out a petition of complaint for one Kumaraddin, which the complainant, Kumaraddin, personally presented in the Joint Magistrate's Court. The Joint Magistrate construed this act of Kali Charan Chund's to be "practising" as a mookhtar within the meaning of the word as used in s. 13 of Act XX of 1865, and finding that Kali Charan had not a properly stamped certificate authorizing him to practise as mookhtar, convicted him of having committed an offence punishable under s. 13 of the Act. The Sessions Judge, being of opinion that the conviction was illegal, referred the proceedings of the Joint Magistrate to the High Court under s. 434, Code of Criminal Procedure (Act XXV of 1861), for the purpose of having the conviction quashed. The Sessions Judge in making the reference observed:—"By s. 11 of Act XX of 1865, mookhtars duly admitted and enrolled may appear, plead, and act in any Criminal Court subject to certain conditions of their certificate, and these words embrace the whole of what constitutes the more general term 'practise.' In the present instance Kali Charan neither appeared nor pleaded. Did he then act? It seems to me that he can only be said to have acted in a private capacity, not in the sense contemplated by the Act (XX of 1865) in a public capacity, as a medium between the complainant and the Court. The law does not forbid one person from giving advice to another, or from drawing up a petition for another on any matter out of Court, and so long as the adviser or writer abstains from dealing with the Court itself in any way in connexion with the matter, he must be considered to be absolved from all consequences under Act XX of 1865."

The judgment of the High Court was delivered by

GLOVER, J.—There can be no doubt, we think, that the Judge is right, and that the mere writing of a petition for a party who afterwards presents that petition himself is not "acting" in the sense of s. 11, Act XX of 1865.

We therefor set aside the order of the Joint Magistrate, and remit the fine imposed upon Kali Charan Chund.

* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Sessions Judge of Backergunge, dated the 17th June 1872.

Before Mr. Justice Markby.

ISWAR CHANDRA DUTT v. ISWAR CHANDRA GHOSE.

1872
August 7.

Compromise by parties out of Court, and without Intervention or Knowledge of their Attorneys—Costs, Taxation and Payment of.

THIS was a suit for dissolution of partnership, with the usual prayer for an account, &c. After the filing of the plaint, the suit was compromised out of Court by the parties, without the intervention or knowledge of their attorneys. The plaintiff's attorney, on becoming aware of what had been done, applied to his client for payment of his costs, and, payment being refused, the attorney applied to the Court for an order directing the taxing officer to tax his bill on scale No. 2, and for an order that the client should pay the costs when taxed.

MARKBY, J., having taken time to consider and to look into the practice of the Court, subsequently made the order in terms of the application.

Before Mr. Justice Kemp and Mr. Justice Glover,

IN THE MATTER OF THE PETITIONS OF SHISTIDHUR PARUI AND OTHERS.*

1872
July 2.

Penal Code (Act XLV of 1860), s. 441—Criminal Trespass—Intention.

An Act does not amount to criminal trespass under s. 441 of the Penal Code, unless it was committed with an intention of committing some offence, or of intimidating, insulting, or annoying some one. Where a party had been exercising a right of fishery for a considerable time, alleging a prescriptive right, the mere fact of continuing to do so after a notice of prohibition is not criminal trespass.

THE accused in this case fished in a lake or Bhoway. This lake was one resumed by Government, and subsequently released in favor of the zemindar. The izardar under the zemindar instituted against the accused a suit in the Deputy Collector's Court for rent, which was dismissed. In appeal the Judge upheld the decision of the lower Court, on the ground that the relationship of landlord and tenant did not exist between the parties, adding that, "if the defendants continue in possession, and do not pay rent to the landlord, they may be sued for trespass."

The izardar next preferred a charge of criminal trespass against the accused before the Deputy Magistrate, alleging that notice had been served on

* Miscellaneous Criminal Case, No. 102 of 1872, against the order of the Sessions Judge of 24 Pargannas, dated the 6th May 1872, affirming that of the Deputy Magistrate of that district, dated the 26th February 1872.

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the defendants prohibiting them from fishing in the lake, and that notwithstanding it they persisted in doing so. The defence of the accused was that they had a prescriptive right to fish in the lake free of rent, which they had been exercising for a long time. The Deputy Magistrate convicted them of criminal trespass under ss. 441 and 447 of the Penal Code. The Sessions Judge in appeal upheld the conviction. The accused applied to the High Court under s. 404 of the Criminal Procedure Code to have the records sent for, and the conviction quashed as being illegal.

Baboo *Bama Charan Banerjee* for the petitioners.—No conviction can be had under s. 441 of the Penal Code without proof of an intention of committing any offence, or of intimidating, insulting, or annoying any person. The accused had been accustomed to fish in this lake for a considerable time, which is not denied by the complainant. There was an attempt made by the complainant to assess rent for the *jalkal* (right of fishery) which was unsuccessful, and instead of going to the Civil Court to establish their right either to receive rent, or to eject the defendants, preferred the present criminal charge. The defendants have been fishing under color of a right, which has been supported by actual use for a considerable length of time.

* The presumption of a criminal intention entirely fails, and the conviction ought therefore to be set aside, there being no other evidence except the admitted act of fishing.

Mr. *Allan* for the complainant.—Before the complaint was preferred, notice had been served on the defendants to restrain them from fishing, and their conduct in continuing to do so, notwithstanding the prohibition of the proprietor, is clearly criminal trespass according to the definition given in s. 441, Indian Penal Code (Act XLV of 1860). Assuming that their former acts of fishing were not acts of criminal trespass, their continuing to fish after notice to desist is unlawful. No other proof of intention is necessary. The continuance of the act complained of in disregard of the notice is sufficient to raise the *prima facie* presumption of a criminal intention. It is for the defendants to establish that they have the right which they allege. The zamindar is not bound to bring a suit in the Civil Court to establish his title.

The judgment of the High Court was delivered as follows:—

GLOVER, J.—I have felt some difficulty about this case, but after consideration, I think that the petitioners should succeed, and the order of the Courts below be set aside.

I do not think it necessary to go into the question as to how far the release of the "Bhowur," or lake by the Collector settled the rights of the complainant, *Indrobbhusan Chuckerbutty*, as the action of the defendants (petitioners before us) does not seem to bring them within the purview of s. 441 of the

Penal Code. To convict under this section, it must be shown that the defendants entered upon property in the possession of another, with "intent to commit an offence," and I think that in this case the element of "intention" is wanting.

The defendants asserted, and had all along asserted, a prescriptive right to fish in the Bhowur without payment of rent, and the zemindar had already failed in a suit brought under Act X of 1859 to get rent from them, not having been able to prove that they were his tenants, or had ever paid rent to him. It may therefore be reasonably concluded that the defendants thought that they had vindicated their claims, and had a right to fish, as they had done heretofore. It cannot, I think, be presumed that they continued to fish with any intent to "commit an offence;" they considered themselves possessed of a right, to which the decision in the Act X suit had given some color, and determined to exercise it. They seem to have acted *bona fide*, and not to have exceeded their supposed privileges.

The zemindar's notice, warning them not to fish, did not change the state of things so far as s. 441 is concerned; and after what has occurred between the parties, no conviction for criminal trespass can possibly be had. The zemindar must establish his rights by a suit in the Civil Court to eject the defendants, or sue to have the defendants declared liable to pay him rent for the future.

KEMP, J.—I quite concur in this view of the case. In the definition of criminal trespass, the entry and the intention with which a party enters are the essentials. In this case it appears to me clear that the petitioners have exercised a supposed right in a *bona fide* manner. They have all along asserted their right to fish in the lake free of payment of rent, and the attempt of the opposite party to establish the relationship of landlord and tenant has signally failed. It was found that the jumma-wasil-bakis filed by the zemindar to establish tenancy and payment of rent were false. It is for the zemindar to take steps to establish his right to receive rent from the petitioners, or (if he treats them as trespassers, which he has hitherto not done) to eject them.

Before Mr. Justice Bayley and Mr. Justice Ainslie.

1872
July 2.

MADAN THAKUR (PLAINTIFF) v. FELIX LOPEZ AND ANOTHER (DEFENDANTS).*

Decree of the Privy Council—Costs for Translation and Printing—Interest.

When on appeal to the Privy Council it was ordered that the decree of the High Court be reversed with £276 12s. 2d. costs, and that the decree of the Zilla Court be affirmed with costs in the Courts below, in execution of the decree it was held that the decree-holder was entitled to the costs of translation and printing incurred by him for transmission of the record to the Privy Council and that he was entitled to interests upon those costs, but not to interest upon the said £276-12-2 (1).

The defendant (respondent) in this case had obtained a decree in the Privy Council against the plaintiff, which was as follows :

"It is ordered that the said decree of the High Court of Judicature at Fort William in Bengal of the 28th November 1865 be and the same is hereby reversed with £276 12s. 2d. costs, and that the judgment or decree of the Zilla Court of Bhaugulpore of the 9th February 1865 be affirmed with costs in the Courts below."

He applied to the Subordinate Judge of Bhaugulpore to be allowed the costs of translation and printing incurred by him for transmission of the record to the Privy Council ; he also claimed interest thereon and on the amount of costs mentioned in the decree of the Privy Council. The plaintiff (appellant) objected to the allowance of the costs of translation and printing and interest as not being covered by the decree of the Privy Council.

The Subordinate Judge held that the respondent was entitled to recover the amount of costs incurred by him for translation and printing, with interest thereon, and also interest on the amount of the decree of the Privy Council.

The plaintiff appealed to the High Court,

Mr. Twidale for the appellant,

Baboo Ramesh Chandra Mitter and Srinath Banerjee for the respondent.

Mr. Twidale contended that costs incurred in India, if not expressly allowed by the decree of the Privy Council, could not be allowed in execution. The Court executing a decree could not go beyond the terms of the decree. No interest could be allowed on such costs as it was uncertain from what date and at what rate such interest would be payable. As the decree of the Privy Council had not allowed interest, the Courts here could not allow it. To do so would be going beyond the terms of the decree—*Mosoodun Lall v. Bheskaree Singh* (2).

* Miscellaneous Regular Appeal, No. 81 of 1872, from an order of the Subordinate Judge of Bhaugulpore, dated the 18th January 1872.

(1) See *Rajah Lilanand Singh v. Maharaja Luckimpur Sing Bahadur*, 5 B. L. R., 605. (2) 6 W. R., Mis. 109.

Baboo *Ramesh Chandra Mitter* contended that the respondents were entitled to the costs of translation and printing as they were costs incurred in the Court in this country—*Mussamat Umatal Fatima v. Ashur Ali* (1) and *Saroda Prasad Mullick v. Lachimpat Sing Dugar* (2). The decree was

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(1) *Before Mr. Justice Ainslie and Mr. Justice Paul.*

The 20th May 1872.

MUSSAMAT UMATUL FATIMA
AND OTHERS v. AZHUR ALI.*

Baboo *Ram Charan Mitter* for the petitioner (decree-holder).

The 13th April, 1871.

Munshi Mahomed Yusoff for the appellants.

Mr. E. E. Twidale and *Baboo Chandra Madhab Ghose* for the respondent.

The judgment of the Court was delivered by

AINSLIE, J.—In this case the decree of the Privy Council reverses the decrees of the three Courts in India with costs in each Court; it also dismisses the suit with costs, and specifies the sum of £490 10s. 10d. sterling as the costs of the appeal to the Privy Council. The question is whether this sum of £490 10s. 10d. includes the costs of translation, &c., incurred in this Court. We do not entertain any doubt that the costs assessed in England were only the costs incurred before the Privy Council, and that they do not include the costs of translation, &c., incurred in this country. The terms of the decree are ample to cover all costs incurred in any stage of the suit, and the Court below rightly overruled the appellant's objection.

There has been a cross-appeal on the part of the respondent for interest on costs; but we are of opinion that, as no interest has been provided for in the decree of the Privy Council, it cannot be allowed now by this Court.

The appeal is dismissed with costs. The cross-appeal is also dismissed.

(2) *Before Mr. Justice Markby.*

SARODA PRASAD MULLICK (APPELLANT TO THE PRIVY COUNCIL), v. LACHIMPAT SING DUGAR AND OTHERS (RESPONDENTS).

MARKBY, J.—As this application now stands, it prays that the Court will send the order of Her Majesty in Council, together with the usual certificate of the costs of translation and preparation of the paper-book of the Privy Council appeal, to the lower Court for execution in the usual course. The order in Council directs that the decree of this Court of the 26th March 1868 and the order of the 10th July 1868 be and the same should be reversed with £238 16s. 6d. sterling costs, and that the decree of the Principal Sudder Ameen of Dinagopore of the 11th April 1867 should be affirmed with costs.

Now it appears to me, looking to that order of Her Majesty, that, upon the face of it, the only costs of the appeal to Her Majesty to which the appellant is entitled is the sum therein specifically named as the costs of such appeal. It is true that the report of the Privy Council, upon which the order is founded, advised Her Majesty that the decree of this Court should be reversed "with costs." But those words do not occur in the order of her Majesty, as neither do the subsequent words contained in the report of the Privy Council, that the decree of the Principal Sudder Ameen should be affirmed with costs in India. But even if I were at liberty to decide this matter upon the report of the Privy Council, and not upon the order in Council (which I do not think I should be at liberty to do), still, looking at the report of the Privy Council, it seems to me that all the costs to which the appellant is entitled in the Privy Council appeal is the sum I have mentioned, because the report of the Privy Council goes on to say:—"In case your Majesty should be pleased to approve of this report, and to dismiss the

* Miscellaneous Special Appeal, No. 6 of 1871, from an order of the Judge of Patna, dated the 21st December 1870, affirming an order of the Subordinate Judge of that district, dated the 10th September 1870.

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with all costs in the Courts below. The decree-holder was also entitled to interest on such costs—*Haradhun Sandyal v. Rash Monee Dassia* (1). *Mosoodun Lall v. Bheekaree Singh* (2) is distinguishable.

Mr. Twidale in reply cited *Onraet v. Sankar Dutt Sing* (3).

The judgment of the Court was delivered by

BAYLEY, J.—We think there can be no doubt whatever in this case. The order of the Privy Council was in these terms (*reads*.)

Three objections have been taken in this appeal: *firstly*, that the costs of translation and printing should not have been allowed to the decree-holder;

appeal, then their Lordships do direct that there be paid by the respondents to the appellant the sum of £238 16s. 6d. sterling for the costs thereof." And where an order of a Court directs generally in the first instance that costs should be paid and then afterwards specifies a particular sum in respect of those costs, then, on ordinary principles of construction, I should say that those specified costs comprise all the costs to which the party will be entitled.

But the doubt arises in this way, in almost all the appeals which go to the Privy Council, there are costs incurred here for translating and preparing the record for transmission to England; and I am informed, and as far as I can discover correctly informed, that it never has been the practice of the Privy Council to make any order in specific terms as to these costs, and that whenever a specific sum is allowed by the Privy Council as costs of appeal, that is considered to cover the costs of appeal in England only, and that it has always been assumed that an order drawn in this form covers the costs here, though they are not mentioned; and of course if so, the applicant is entitled to them, as this Court has no discretion to disallow any costs allowed by the Privy Council. Now, I feel bound to say that it seems to me to be by no means a matter of course that, because the costs are allowed which are incurred in England, the costs for translating and preparing the record for transmission to England should be allowed also. It has been constantly the subject of remark, both here and in England, that the records which are transmitted by us are unnecessarily long; but this Court has very little power over that matter, as we are compelled to transmit in some shape

or other all such documents, except merely formal documents, as the parties require. We have, however, made rules for the express purpose of enabling the Privy Council to judge whether the record transmitted is open to this complaint, and whether costs which are unnecessary have been incurred in this respect. But these rules will be wholly ineffectual if it continue to be assumed as a matter of course that all decrees of the Privy Council, which give a specific sum for costs, give by implication the costs here also. But having said this, because it appears to me desirable to draw attention to the matter, I do not think I should be justified in disallowing these costs. I think it has been too long the practice of this Court to allow them in all cases for me now to adopt a different rule, and I should be the more unwilling to disallow the costs of this case, because having seen the paper, and having formed an opinion as far as I could, it seems to me that it is not probable that the Privy Council would have thought it necessary to deprive the appellant of these costs, their Lordships having allowed the general costs. I can see nothing at all in this record to suggest that there was any unnecessary expense incurred here. Therefore, upon the whole, I think I ought to allow this application to be granted. Possibly, had there been apparent extravagance and waste in the preparation of the record for transmission to England, I should have referred the parties to the Privy Council for an order on this subject.

(1) 2 W. R., Mis., 21.

(2) 6 W. R., Mis., 109.

(3) 5 B. L. R., App., 60.

secondly, that no interest should have been allowed on those costs; and, *thirdly*, that no interest should have been allowed on the sum of £276. 12s. 2d. allowed as costs by the Privy Council.

The Full Bench decision of *Mosoodun Lall v. Bheekaree Sing* (1) has been very much relied upon by the appellant to show that we should not go beyond the terms of the decree, and it is contended that as there is nothing in the decree specified to show that the charges for translation or printing are to be calculated as costs of these Courts, or that any interest was awarded either on those charges or on the £276 12s. 2d. awarded as costs by the Privy Council, none of these items should have been allowed.

Now it is quite clear that what is affirmed by the Privy Council is the decree of the Zilla Court of Bhaugulpore dated the 9th February 1865 with costs in the Courts below. The "Courts below" included also the High Court. In the High Court the cost of translation and printing had to be undergone. It was a cost actually incurred and necessary to be incurred by the parties, and therefore the terms of the decree of the Privy Council in this case clearly include the charges for translation and printing as costs in the Courts below.

The only cases in which the question of translation and of printing being included as costs had been before this Court are one heard by Markby, J., sitting in the Privy Council Department on the 20th May 1872 (2), and one by Ainslie and Paul, JJ. (3). In both the cases the result of the orders passed is that the charges for translation and printing should be allowed as costs. Under these circumstances it seems to me that the first ground of appeal must fail.

As regards the *second* objection it appears that the decree of the Zilla Court, which is the decree affirmed by the Privy Council and which has now to be executed, gives interest on the costs incurred. Now the charges for translation and printing are also costs incurred. The money has been actually expended by the parties, and as the decree provides for interest on the costs, the decree-holder should not lose the interest on such costs.

As regards the *third* objection, *vis.*, as to the interest on the £276 awarded as principal costs by the Privy Council in England, it is clear from the terms of the order of the Privy Council that a distinction is drawn between the costs allowed by that tribunal and the costs incurred in the Courts below. It seems to have been the intention of the Privy Council to make the £276 12s. 2d. a part of their own order for costs. No provision is there made for any interest on that sum, and we therefore think that no interest ought to be allowed on that sum.

The result of our order, therefore, is that the order of the lower Court is

(1) 6 W. R., Mis., 109.

(3) *Mussamat Umatul Fatima v. Ashur*

(2) *Saroda Prasad Mullick v. Lachmipat Ali*, ante, p. 23.

Sing, Dugar, ante p. 23.

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affirmed except in so far as it awards interest on the £276 12s. 2d. awarded as costs by the Privy Council.

Under the circumstances we think that each party should bear his own costs of this appeal.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Bayley

1872

July 9.

BOCHA GOPE CHOWDHRY (PLAINTIFF) v. BRAJAGABIND DAS
(DEFENDANT).*

Suit against the Surety of a Nazir for Damages—Act VIII of 1859, s. 223.

The surety of a Nazir who had entered into the usual bond of indemnity with the Collector of the district against all losses caused by the Nazir during the tenure of his office, was held not liable, at the suit of a person whose property had been misappropriated by the Nazir, to make good any loss sustained by such person.

IN a suit in which Gopal Krishna was plaintiff, and Bocha Gope was defendant, Gopal Krishna caused fifteen buffaloes of Bocha Gope to be attached before judgment. A decree was passed in favor of Gopal Krishna. In execution of this decree, ten of these buffaloes were sold. Bocha Gope then brought a suit against Gopal Krishna for recovery of the value of the five buffaloes and their five young ones, alleging that they had been misappropriated by Gopal Krishna. The Munsif passed a decree in favor of Bocha Gope, but on appeal the Subordinate Judge reversed the decree, and held that no suit lay against Gopal, and that Bocha Gope should have brought his suit against the Nazir, who was responsible under s. 223, Act VIII of 1859. Bocha Gope then instituted a suit against the Nazir, Thakur Das, and obtained an *ex parte* decree. Bocha Gope then applied for execution of this decree, but found it impossible to realize anything from Thakur Das. Hence this suit was instituted by Bocha Gope against Brajagabind, the surety of the Nazir, and the Collector of Sylhet (on behalf of the Government), for recovery of the value of the five buffaloes and their five young ones misappropriated by the Nazir.

The defendant Brajagabind set up (*inter alia*) that he was only liable to the Government, and not to the plaintiff, for any loss caused by the act of the Nazir.

The bond under which Brajagabind became a surety for the Nazir contained the following clause:—

“If he (the Nazir) appropriates to himself the *tebbil* or any money pertaining to the office of Nazir, or otherwise causes loss or becomes liable to Government for any sum, then neither I nor my heir will object to pay the appropriated money, and the loss incurred will be recovered by sale of the property pledged.”

* Special Appeal, No. 294 of 1872, from a decree of the Judge of Sylhet, dated the 9th October 1871, reversing a decree of the Subordinate Judge of that district, dated the 21st June 1871.

The Subordinate Judge held that the Nazir was liable to the plaintiff for the loss of the buffaloes, and that the surety was liable under the terms of the bond to make good the loss; that the surety was not only liable to the Government for the acts of the Nazir, but also to the person who had sustained any loss by the Nazir's act. He further held that the Government was rightly made a party to the suit, because if the plaintiff had failed to make the surety liable under the bond, he could have obtained a decree against the Government. He accordingly passed a decree, declaring the plaintiff entitled to execute the decree obtained by him against Thakur Das Nazir, against the property pledged as security for the said Nazir, and to realize the amount from the defendant Brajagabind, and that the defendant Brajagabind do pay the costs to the plaintiff and the Government.

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The defendant Brajagabind appealed to the Judge.

The Judge held that, under the terms of the bond, Brajagabind was liable to the Government alone, and not to the plaintiff, and that the plaintiff could not recover from the surety direct. He accordingly dismissed the suit.

The plaintiff appealed to the High Court.

Baboo *Kasikant Sen*, for the appellant, contended that, under the terms of the bond, the surety was not only liable to Government for the acts of the Nazir, but to any person who sustained loss by the Nazir's act.

Baboo *Durgamohan Das* and *Rajaninath Bose* for the respondent were not called upon.

The judgment of the Court was delivered by.

COUCH, C. J.—The decision appealed against is correct. The party could only be liable on his obligation as surety. It was an obligation to the Government, and not to the plaintiff. The terms of the instrument of suretyship are these:—(*reads*). It is clear that what he undertook was to indemnify the Government for any loss that the latter might incur. The plaintiff has no right under that bond to Government to recover against the surety for wrongful acts, such as misappropriating goods, &c., done by the Nazir.

The decision of the lower Appellate Court is right, and this appeal must be dismissed with costs.

Before Mr. Justice Bayley and Mr. Justice Markby.

AMJAD ALI (ONE OF THE DEFENDANTS) v. KUNKU SHAW AND ANOTHER
(PLAINTIFFS).*

1872
Feb'y. 20.

Act VIII of 1859 s. 246, Right of suit under—Declaratory Decree—Cause of Action—Limitation.

Baboo Girish Chandra Ghose and Taraknath Dutt for the appellant.

Baboo Kali Krishna Sen for the respondents.

MARKBY, J.—For the purpose of deciding the question which is now before us, namely, whether the present suit will lie, I will assume that the facts, which the plaintiff is desirous to establish in proof, have been alleged at the proper time and in the proper manner in the plaint or otherwise; and that he has also stated, with sufficient clearness and accuracy, the nature of the decree which he seeks to obtain. In other words, I will consider the question independently of any technical rules as to the form in which the allegations in a suit ought to be made, or the plaint drawn.

The case of the plaintiff, as I understand it, is that he was the proprietor of certain land which was let to one Man Sing; and that whilst Man Sing was in possession, and whilst there were still some few months to run before his tenancy expired, a creditor took out execution against him, and put up for sale the future profits of the property (wasilat) which would come into the hands of Man Sing, alleging that the interest of Man Sing was not, as the plaintiff says, that of tenant, but that of a usufructuary mortgagee. The plaintiff says that upon this he put in a claim under s. 246, but that his claim was rejected; and the present suit is said to be brought under that section to establish the truth of the plaintiff's assertion, that Man Sing's interest in the property was that of a tenant only, and not that of a usufructuary mortgagee. It is stated by the plaintiff that, on the expiration of Man Sing's settlement, he re-let it to a fresh tenant; so that whatever may have been the nature of Man Sing's interest, there is no assertion by any one that that interest is now in existence. The terms of the order of adjudication of the plaintiff's claim are not stated; nor are the terms of the order for attachment and sale; but the plaintiff states that the latter did not specify any period of time during which the profits of the land were attached.

Now, putting all or any part of the above facts into the most formal shape possible, they do not seem to me to present any ground for maintaining a suit. It is not attempted to assert that they lay the foundation for a declaratory decree under the general law, but it is contended that the plaintiff's claim in execution

* Special Appeal, No. 996 of 1871, from a decree of the Subordinate Judge of Purneah, dated the 11th May 1871, reversing a decree of the Munsif of Kissen-gunge, dated the 15th February 1871.

having been disallowed, he is at liberty to bring a suit "to establish his right" under section s. 246. Certainly the words of that section are not very precise, but I take it that, in order to maintain a suit under it, the plaintiff must be prepared to prove two things: first, that the right which he put forward has been investigated, and disallowed; and, secondly, that the right which he seeks to have declared is still in existence. It has been held that, if the claim has been investigated and disallowed, the claimant is bound to bring his suit within the year; but that, if the execution is allowed to proceed without the claim having been investigated, the ordinary rule of limitation applies. This is upon the ground that the latter part of s. 246 only applies where the claim has been investigated and disallowed; and therefore, unless the plaintiff's claim has been investigated and disallowed, no suit will lie at all under the section, and the plaintiff is left to his ordinary remedy,—that is to say, he may bring a suit when and not until his right has been disturbed. So also, upon a reasonable construction of the words of this section, I do not think the Court could be called upon to investigate the claim, if the claim made and disallowed had ceased to exist. That might be material if any rights of the plaintiff had been infringed, and the plaintiff were seeking compensation, or to recover possession. But the object of the suit contemplated by this section, and the plaintiff's object in this suit, is not to obtain compensation for any injury, or to recover possession. We have at present nothing to do with that. The object is to establish a right which has been impugned by the proceedings in execution, and I do not think the Legislature can have intended that, apart from any claim for compensation or possession, the time of the Court should be taken up in inquiring into a dispute which, for any present or future purpose is wholly immaterial.

It is said that the plaintiff's claim having been dismissed, it must have been disallowed; but that does not follow. The question which the plaintiff raised by his claim was whether Man Sing's interest was that of a tenant or a usufructuary mortgagee. The plaintiff himself states in his plaint, as I am informed, that the attachment of the profits to accrue was made without any specification of time or other particulars. And it being admitted that the judgment-debtor had some interest, the execution may have been ordered to proceed without any disallowance of the present plaintiff's claim. So it is also clear that it is not an existing right which the plaintiff now seeks to establish. He seeks to establish that, at a time now gone by, he was owner of this land, and that Man Sing was his tenant, and not his usufructuary mortgagee. It seems to me that no claim being made for compensation or for possession, and there having been no infringement of the plaintiff's right, that this would be a perfectly useless inquiry. The pleader for the plaintiff was unable to suggest any possible advantage that would arise by this right being declared; and, as I have already said, I do not think it was intended by s. 246 that we should prosecute an inquiry which would produce no result.

It was said that this objection was not taken below; nor was it, in the

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1872 precise form in which it is taken now, though the suit was dismissed by
 AMJAD ALI the Munsif on somewhat different ground as informally brought. For the
 v. reasons I have stated, I think that judgment was right, and that it ought to be
 KUNKUSHAW affirmed, and it is unnecessary to consider in this case whether, after a suit has
 been heard and determined without objection, the Court of Appeal will allow
 an objection to be taken that the suit, as brought, will not lie.

I think the suit should be dismissed, and that the plaintiff should pay the costs
 in this Court and the Courts below. But I think that the plaintiff may be at
 liberty to bring a fresh suit, upon condition of his first paying to the defendant
 the costs which he has been ordered to pay in this suit.

BAYLEY, J.—I am of the same opinion. Under the facts of the case, the
 plaintiff's pleader could show no real cause of action, or specific subject-matter
 of injury, but wanted a declaration vaguely of a right, the actual destruction
 or injury of which right is not shown. I concur in all the order proposed by
 Markby, J.

1872
 Aug. 29.

Before Mr. Justice Bayley and Mr. Justice Mitter.

QUEEN v. KUMODINIKANT BANERJEE CHOWDHRY.*

Recognizance—Criminal Procedure Code (Act XXV of 1861), s. 290.

Under s. 290 of the Criminal Procedure Code, an order to execute a second
 recognizance during the time the first recognizance is in force is illegal.

THE following reference was made by the Officiating Sessions Judge of Dacca.

"During the pendency of one recognizance for a time of one year, the
 Deputy Magistrate has called on the applicant to execute a second engage-
 ment for a similar period.

Now the form of recognizance prescribed by the Code is perfectly general
 and seems simply to declare that the recognizant is a turbulent character, and
 must be subjected to special restraint. So that if, at the suit of A., a recog-
 nizance were taken from B., and he broke the piece ultimately against C.,
 and not A., I have no doubt that his recognizance might be forfeited. I do
 not think, therefore, that it can in any way be urged correctly that the recog-
 nizances were required in reference to separate transactions.

Under these circumstances it appears to me that the Deputy Magistrate's
 order of the 15th June last, requiring the applicant to execute a recognizance
 for a term of one year, during the pendency of a similar recognizance, was
 illegal under s. 290, and I beg therefore to refer it to the Court, in order that
 it may be quashed, and the Deputy Magistrate may be directed to proceed
 according to law."

The judgment of the Court was delivered by

MITTER, J.—We concur with the Officiating Sessions Judge in holding that
 the second recognizance was illegal. The first recognizance was general and
 unlimited in its terms according to the form given in the law, and it is there-
 fore clear that, to take a second recognizance before the period fixed in the first
 recognizance had elapsed, would be a virtual interference with the provisions
 of s. 290, Criminal Procedure Code.

* Reference to the High Court, under s. 434 of the Code of Criminal Proce-
 dure, by the Officiating Sessions Judge of Dacca.

Before Mr. Justice Kemp and Mr. Justice Glover.

IN THE MATTER OF THE PETITION OF UDAI CHAND MUKHOPADHYA.*

1872
July 22.

Criminal Procedure Code (Act XXV of 1861), s. 422—Penal Code (Act XLV of 1860), s. 202.

Where a person had been found guilty by a Magistrate of the offence of intentionally omitting to give information of an offence which he was bound to give, and on appeal the Judge found that there had been no evidence given of the omission, *held, per KEMP, J. (GLOVER, J., contra)*, the Judge could not remand the case for additional enquiry under 422 of the Criminal Procedure Code (1).

THE accused in this case was charged under s. 202 of the Penal Code with having committed the offence of neglecting to give information to the Police or Magistrate of a dacoity said to have taken place on the 7th March 1872, in Mauza Ghugni, Thanna Kristomanagoree, he being the gomasta of the zemindar of the village, and as such bound, by s. 4 of Regulation III of 1812, to give early information of certain offences committed in the village. The Magistrate convicted him of the offence charged, and sentenced him to suffer six months' rigorous imprisonment and to pay a fine of Rs. 200, and in default of payment to a further rigorous imprisonment of one month.

The accused appealed against the Magistrate's conviction and sentence to the Sessions Judge of Hooghly.

The Sessions Judge said :—"There is no evidence as to the main point in the charge—the omission to give information. The case must accordingly be sent to the Magistrate to have evidence taken on this point under s. 422 of the Code of Criminal Procedure." The accused was undergoing rigorous imprisonment under the Magistrate's sentence pending this enquiry.

On application to the High Court, Kemp and Glover, JJ., called for the record of the case under s. 404 of the Criminal Procedure Code, and admitted the accused to bail pending the decision of the High Court.

Baboo Hemchandra Banerjee and Durgamohan Das for the petitioner.

The gist of the offence is the omission to give information ; and when there is no evidence of this omission, as admitted by the Judge, the conviction and sentence are illegal. The Judge was bound on this state of the evidence, under s. 426 of the Criminal Procedure Code, to reverse the Magistrate's finding and sentence. The Judge is in error in remanding this case to the Lower Court for additional enquiry under s. 422 of the Criminal Procedure Code. This section contemplates a further enquiry by taking additional evidence to be directed by an Appellate Court when the conviction by the lower Court has

* Miscellaneous Criminal Case, No. 141 of 1872, against an order of the Sessions Judge of Hooghly, dated the 2nd July 1872, reversing that of the Magistrate of that district, dated the 18th June 1872.

(1) See Act X of 1872, s. 282.

1872

IN THE
MATTER OF
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OF UDAI
CHAND MU-
KHOPADHYA.

been based upon some evidence which might legally support it, but which, in the opinion of the Appellate Court, is not quite satisfactory. This section does not empower an Appellate Court so to act in a case where there is no evidence legally capable of sustaining the charge. There is no finding as to whether the alleged dacoity ever took place. The accused, as soon as he himself heard of the alleged offence, did give information to the Police; and the prosecution is bound to show that there was not simply an omission, but an intentional omission to give the information at the earliest opportunity.

GLOVER, J.—The Magistrate convicted the accused under s. 202, Penal Code, holding that he knew of the commission of the dacoity in Mussamat Arjila's house, and, so knowing, intentionally omitted to give information to the authorities. The Sessions Judge on appeal found that a dacoity had taken place, and that the accused was well aware of the fact, but that there was no evidence on the record to prove the "omission." He, therefore, ordered the Magistrate, under s. 422, Code of Criminal Procedure, to supply the necessary evidence, and to return the case to his Court for final disposal.

It is not quite clear to me, from the wording of the Sessions Judge's order, whether the evidence required was on the point of simple "omission" or of "intentional omission;" and if I were trying the case as a regular appeal, I am not sure that I should agree with the Sessions Judge as to there being no evidence as to the fact of "omission." I think that there is some evidence as to the "intention" also; but however that may be, I do not, after much consideration, find anything illegal in the Sessions Judge's order. S. 422, Code of Criminal Procedure, gives the Appellate Court power to direct further enquiry to be made, and additional evidence to be taken, whenever it thinks such enquiry and evidence necessary "upon any point bearing upon the guilt or innocence of the appellant." The words are exceedingly large, and give an almost unlimited discretion. In the present case, the Sessions Judge considered it proved that a person, who was bound by law to give certain information, was possessed of that information, but that there was not on the record evidence of his "omission" to supply the information in question to the Police. No doubt, proof of the omission was absolutely necessary, and without it there was no case against the accused. But s. 422 gave the Sessions Judge the power, as it seems to me, of ordering the deficiency to be supplied. If an Appellate Court is bound under all circumstances to decide on the guilt or innocence of an accused person on the evidence taken in the Court of first instance, and has no power to supplement it in any way, then I cannot understand the object of s. 422, Code of Criminal Procedure. That object I take to be the prevention of a guilty person's escape through some careless or ignorant proceedings of a Magistrate, or the vindication of a wrongfully accused person's innocence, where the same carelessness or ignorance has omitted to record circumstances essential to the elucidation of truth. The words of the section are, as I said

before, "any point bearing upon the guilt or innocence of the appellant," and the Judge's action appears to me to have been perfectly justified.

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KEMP, J.—I regret that I am unable to concur with Glover, J. Apart from the fact that the Magistrate omitted in the case to record any finding, I am of opinion that, before a person can be convicted of an offence under s. 202 of the Indian Penal Code, there must be legal evidence, first, that he has knowledge or reason to believe that some offence has been committed; second, an "intentional" omission to give "any" information respecting that offence; and, third, that he is legally bound to give that information.

The petitioner Uday Chand Mukhopadhyaya, as the village gomasta, was legally bound to report crimes. An offence, in this case of dacoity, was committed of this there appears to be evidence, which, though discredited in the first instance by the Deputy Magistrate, was believed by the Magistrate and, on appeal, by the Sessions Judge. It may also, I think, be conceded that the petitioner had knowledge, though not immediate, of the offence; but the Sessions Judge finds, and I quote his own words, "there is no evidence as to the main point in the charge—the omission to give information. The case," says the Judge, "must accordingly be sent to the Magistrate to have evidence taken on this point under s. 423 of the Code of Criminal Procedure." The accused, be it remembered, remained in jail, and there he would have remained, but for the action of this Court which released him on bail, while the Police were hunting up evidence to convict him.

It appears to me that the "main" point under s. 202 is whether the omission was intentional. There may be knowledge or a reason to believe that an offence has been committed; there may be an omission to give any information; but it is clear, at least to me, that the gist of the offence is the intention. Now the Sessions Judge finds, not that the evidence is insufficient, though there may be some evidence, but that there is no evidence at all. S. 423, in my opinion, does not apply to such a state of things. Where there is some *prima facie* evidence bearing upon the guilt or innocence of the accused, the Appellate Court may, under s. 422 of the Code of Criminal Procedure, direct additional evidence to be taken; but in the case before us, the Sessions Judge finds that there is no evidence at all. What, then, was there to add to, and how does the necessity for additional evidence arise? I am of opinion that the accused ought to have been acquitted, as there is no evidence of an intentional omission, or, according to the Judge's finding, of any omission at all.

I therefore quash the conviction and sentence, and direct the immediate release of the petitioner.

Before Mr. Justice Bayley, and Mr. Justice Mitter.

1872
May 11.

IN THE MATTER OF THE PETITION OF BABOO RAMESHAR PRASAD NARAYAN SING.*

Act XXXI of 1860, ss. 25, 26, and 32—Carrying or possessing Arms without a License—Issue of Summons or Warrant without specifying the Charge.

Baboo Rameshar Prasad Narayan Sing applied to the Magistrate of Gya, on the 13th April 1872, for a license to carry arms. He had held one previously entitling him to carry ten swords, but had mislaid it, and it was not until he found it again that he came forward for a new license. Between the date of the expiry of the old license and the application for a new one a period of one year and nine months had passed, during which the applicant had carried and possessed arms without any license, a fact which was known to the Magistrate. When the application for a fresh license was made, the Magistrate ordered the mookdar, who presented it, to tell his client to appear in person. At the same time a written order to the same effect was issued to the Court Inspector, who caused it to be served on the Baboo in the usual way, taking receipt of the service from his *karpardar* (manager). This written order was issued without the knowledge or authority of the Magistrate. On being served with this written order, the Baboo, through his pleader, applied to the Magistrate to be excused from personal attendance, at the same time objecting to the indefinite nature of the order which cited no reason for the personal appearance, nor fixed any date for so doing. The Magistrate on this issued a summons to the Baboo to appear in person at 6 A.M. the following morning to answer to an alleged offence (the particulars of which were not stated in the writ) against the provisions of Act XXXI of 1860. At 6 A.M. the ensuing morning, the Baboo repeated his request to be heard through a pleader, which was rejected, and a warrant issued for his arrest.

The Sessions Judge of Gya was then moved to send up the proceedings of the Magistrate to the High Court, under s. 434 of the Code of Criminal Procedure, to have the same quashed as being illegal. The Sessions Judge submitted the proceedings to the High Court. In his order of reference the Judge observed :—

“In my opinion these proceedings, i. e., the issue of the summons and warrant are illegal; for, so far as I can see, the Baboo, at the time of presenting his petition, was guilty of no offence whatever under the Arms Act.

“Section 25 and 26 of Act XXXI of 1860 clearly contemplate those cases only where persons are caught in the act of carrying arms; and action under them is warranted only when the offender is caught in *flagrante*

* Reference, under s. 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Gya.

dicto. Section 31 again refers to search and seizure of arms under certain other circumstances, none of which are applicable to the present case.

"The most then that can be said against the petitioner is that he has in his possession certain arms without a license, but this would be an offence only if the provisions of s. 32 of the Act had been extended to, and were still in operation in this district. The petitioner states that no order was ever issued for the disarming of the district. To ascertain this, I wrote to the Magistrate, requesting him at the same time to let me know under what section of the Arms Act he had taken proceedings against the petitioner; but on the first point he states that he can give no answer 'at present,' and on the other he has practically refused to give any answer at all. In the meantime, however, I have caused a search to be made through all the Government notifications in my office since 1857, and I am unable to find any order for the disarming of Gya. while from the Government notification of 1st October 1860 it is clear that, since that year at all events, s. 32 of Act XXXI of 1860 has not been in operation in the Lower Provinces of Bengal.

"If the view I have taken of the law be correct, it seems clear that the petitioner has committed no offence that would warrant the issue of a summons or warrant for his personal appearance before the Magistrate. For the foregoing reasons I am of opinion that the proceedings of the Magistrate are illegal, and should be quashed.

"I am, therefore, under the circumstances compelled to transmit the record for the consideration and orders of the High Court."

Mr. Allan for the petitioner.

The following was the judgment of the Court:—

Taking the facts, as disclosed by the record we are of opinion that the Sessions Judge is quite right, and we accordingly set aside the proceedings of the Magistrate as contrary to law (1).

Before Mr. Justice Bayley and Mr. Justice Mitter.

IN THE MATTER OF THE PETITION OF W. N. LOVE.*

Infringement of Municipal Bye-laws—Daily Fine illegal.

1872

August 29.

THE following reference was made by the Officiating Sessions Judge of Hooghly:—

"The petitioner, W. N. Love, has been convicted, under s. 18 of the Howrah

* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Hooghly.

(1) In *re Madharain Puri*, decided on 5th July 1872, Kemp and Glover, JJ. following the ruling in this case, held that mere possession of arms was no offence under Act XXXI of 1860 in districts where s. 32 of the Act is not in force.

1872
IN THE
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Municipal Bye-laws (1), and fined Re. 1 for infringement thereof, as well as ordered to pay a daily fine of Rs. 2 (I presume until he complies with the Bye-law).
An order of this description has been held, not only to be contrary to law, but to vitiate the entire conviction—*In re Sagar Dutt* (2); and following that rule, I feel bound on the petitioner's application to submit the proceedings under s. 434 of the Code of Criminal Procedure to have that order set aside."

The judgment of the Court was delivered by.

MITTAR, J.—We think that the daily fine of Rs. 2 was illegal, and ought to be set aside. But under the circumstances of this case, we do not think it necessary to exercise our special powers of discretion by setting aside the fine of Re. 1 which was inflicted upon the prisoner for an offence actually committed. The conviction on that offence is not bad in law, and we do not see any reason for exercising our extraordinary powers by setting aside that conviction.

Before Mr. Justice Kemp and Mr. Justice Glover.

1872
July. 26

QUEEN v. MOZAFAR KHALIFA.*

Criminal Procedure Code (Act XXV of 1861), s. 62—Order by a Magistrate prohibiting the Straying of Cattle—Conviction for Breach of such Order.

An order by a Magistrate, prohibiting the straying of cattle within certain local limits, is not an order within the meaning of s. 62 of the Code of Criminal Procedure. There can be no conviction for disobedience of such order under s. 239 of the Penal Code.

THE Deputy Magistrate of Jamalpore, purporting to Act under s. 62 of the Code of Criminal Procedure, promulgated an order on the 27th August 1869 in general terms prohibiting the owners of cattle, calves, goats, sheep, and ponies from allowing such animals to stray loose within and about the town and station of Jamalpore, and prescribing the limits within which the said order should have effect.

On the 6th May 1872, one Mozafar Khalifa was convicted, under s. 239 of the Penal Code, for permitting his pony to stray about loose, and sentenced to pay a fine.

* Reference to the High Court, under s. 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Mymensing, dated the 12th June 1872.

(1) The external roofs and walls of any hut or any other building whatever of grass, leaves, or any other inflammable materials. The commissioners may from time to time notify what bazars and roads to be erected or renewed, in or near any large bazar or main road, shall not be made come under the above denomination.

(2) 1 B. L. R., O Cr., 41.

The Sessions Judge of Mymensing being of opinion that the Deputy Magistrate had no authority, under s. 62 of the Criminal Procedure Code, to pass the order of the 27th August 1869, sent the proceedings in the above case to the High Court, under s. 494 of the Criminal Procedure Code, to have the conviction, under s. 289 of the Penal Code, quashed. He was also of opinion that the conviction was not warranted by anything within the meaning of s. 289 of the Code. The Sessions Judge, in making the reference, relied on the case of *Queen v. Amiruddin* (1).

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QUEEN
v.
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KHALIFA.

The Deputy Magistrate was called upon by the Sessions Judge to support his order, and he cited the case of *Queen v. Abbas Ali Chowdhry* (2).

The judgment of the High Court was as follows:—

We concur with the Sessions Judge in the view he has taken of this case. The order of the Deputy Magistrate must be quashed, and the fine, if paid, refunded.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.

1872
Sept. 6.

GAURINATH MOOKERJEE (PLAINTIFF) v. MADHUMANI PESHAKAR
(DEFENDANT).*

Landlord and Tenant—Lodgingslet to a Prostitute.

A landlord cannot recover the rent of lodgings knowingly let to a prostitute who carries on her vocation there.

The following case was submitted by the Judge of the Small Cause Court of Kishnagar for the opinion of the High Court:

"In this case the plaintiff sued the defendant, a prostitute, for rent of a room in a certain building in which she lives and plies her vocation.

The Court held that the plaintiff could not recover the rent sued for, as a Court of Justice would give no assistance to the enforcement of a contract opposed to public policy, and no subject can lawfully do that which has a tendency to be injurious to the public or against the public good. There being no Indian precedent bearing on the subject, the plaintiff desired a reference under s. 22, Act XI of 1865, and the judgment of this Court was pronounced contingent on the opinion of the High Court, which is solicited on the following point:—

Whether a landlord can recover rent of lodgings knowingly let to a prostitute, who also carries on her vocation there?

* Reference, No. 11 B, dated the 8th July 1872, from the Judge of the Small Cause Court at Kishnagar.

(1) 6 B. L. R., 78.

(2) 6 B. L. R., F. B., 74.

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PESHAHAR.

In making the reference, the Judge cited Broom's Commentaries on the Common Law, 3rd edition, page 270, and *Collins v. Blantern* (1).

The following was the judgment of the High Court:—

We are of opinion that the principles which governed the English cases cited by the Judge are applicable to this country, and that his decision was correct.

1872
Sept. 9.

Before Sir Richard Couch, Kt., Chief Justice, and Mr. Justice Ainslie.
PROTIMA AURAT (PLAINTIFF) v. DUKHIA SIRKAR AND OTHERS (DEFENDANTS).*

Illegal Contract—Money paid under an illegal contract.

THE following case was submitted by the Judge of the Small Cause Court of Serajgunge:—

"The plaintiff alleges that her husband was in *hajet* in a case of *bad-maashi*, and while there, the defendants took from her Rs. 50, on condition of causing the release of her husband; but they failed to perform the contract: the defendants deny the receipt of any money from the plaintiff or the entering into any contract with her for the purpose of causing the release of her husband. The plaintiff, in her plaint, has not stated anything as to how the money that she paid to the defendants was to be spent, and to whom it was to be paid. From the evidence of two of the plaintiff's witnesses, it appears that the defendants received the money from the plaintiff to pay the same as a bribe to the darogah, under whose custody [her husband] was; this fact elicited from the plaintiff's own evidence renders it quite clear that the contract on which the money was paid was an illegal one; it was in fact a contract which was against public policy, and intended to evade the course of law; such a contract cannot be enforced in a Court of Justice, and money paid under such an illegal and immoral contract cannot be recovered by suit. I am of opinion, therefore, that the plaintiff's case must fall down on her own evidence. . . . But as her pleader has pressed it upon me that the case may be referred to the High Court for opinion, I deem it proper to refer this case under s. 22 of Act XI of 1865. I, therefore, dismiss the plaintiff's claim with costs and interests, subject to the opinion of the High Court as to whether money paid for an illegal purpose, as bribing a darogah, can be recovered by a suit in Court."

The judgment of the High Court was delivered by

Couch, C. J.—The Judge's view of the law is right.

* Reference, No. 14, dated the 18th July 1872, from the Judge of the Small Cause Court at Serajgunge.

(1) 1 Smith's L. C., 325.

Before Mr. Justice Macpherson.

WARDEN v. WARDEN AND ANOTHER.

Divorce—Inability to serve Decree nisi on Respondent.

1872
Nov. 18.

Mr. Branson moved on behalf of the petitioner to make absolute a decree nisi dated 28th March 1872, for the dissolution of his marriage with the respondent. The petitioner had tried in vain to discover the whereabouts of the respondent and co-respondent, and had been unable to serve them with copies of the decree nisi. Mr. Branson submitted that the Court could, under the circumstances, make the decree absolute without such service—*Willis v. Willis* (1).

His Lordship made the decree absolute.

Before Mr. Justice Glover and Mr. Justice Miller.

IN THE MATTER OF THE PETITIONS OF GABINDA CHANDRA GHOSE AND ANOTHER.

1872
Sept. 17.

Code of Criminal Procedure (Act XXV of 1861), s. 318—Parties to Proceedings under s. 318—Who are to be served with Notices under s. 318—Right of a Party in proceedings under s. 318 to summon Witnesses—Discretion of the Magistrate.

THE Deputy Magistrate of Khoorna had instituted proceedings under s. 318 of the Code of Criminal Procedure, with respect to 350 bigas of land called Ghineerabad, possession of which was claimed by Ananda Chandra Sirkar and Benimohan Biswas on one side, and Gabinda Chandra Ghose and Shamasundari Dasi on the other. Upon the complaint of one Tamizuddin, gomasta of Ananda Chandra Sirkar and Benimohan Biswas, notice was ordered to be served on Gabinda Chandra Ghose. After the Deputy Magistrate had taken evidence as to actual possession from both parties, Shamasundari Dasi presented a petition at the last moment, praying to be made a party, as she was a co-sharer with Gabinda Chandra Ghose and others and was in possession, and for summonses against certain persons to appear to give evidence in support of her claim. The Deputy Magistrate examined one witness, who was present in Court, on her behalf, and refused to postpone the case for the examination of the other witnesses named in her petition. The Deputy Magistrate held that Ananda Chandra Sirkar and Benimohan Biswas were in possession, and passed an order retaining them in possession.

Gabinda Chandra Ghose and Shamasundari Dasi moved the Sessions Judge to refer the proceedings of the Deputy Magistrate to the High Court, under s. 434 of the Code of Criminal procedure, to have the order passed by the Deputy Magistrate quashed for various reasons. The Sessions Judge, however, referred the proceedings to the High Court on only two points. He was of opinion that, as Ananda Chandra Sirkar and Benimohan Biswas claimed to

* Reference to the High Court, under s. 434 of the Code of Criminal Procedure by the Sessions Judge of Jessore.

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hold the land under a lease from several parties as co-proprietors, one of whom was Gabinda Chandra Ghose, who had appeared and denied the genuineness of such lease, and of possession under it, the Deputy Magistrate was wrong in passing a decision in the matter without giving notice to the other co-proprietors, as required by s. 318 of the Code. He was also of opinion that the Deputy Magistrate ought not to have refused to summon the witnesses named by Shamasundari, on the ground that her application was made at the last moment.

Mr. Rochfort for Gabinda Chandra Ghose and Shamasundari Dasi in support of the reference.

Mr. Sandel and Baboo Jaigabind Shaw for Ananda Chandra Sirkar and Benimohan Biswas were not called upon.

The judgment of the High Court was delivered by—

GLOVER, J.—This is a reference made by the Sessions Judge of Jessore to have a certain order passed under s. 318 of Act XXV of 1861 by the Deputy Magistrate of that district quashed.

The only substantial ground on which the Judge thinks the Deputy Magistrate's order illegal is that, whereas the *patta* under which one of the parties in this case claims was signed by a great number of co-sharers of the land in question, and all of those co-sharers have not been served with notice, but only one of them, this is a sufficient ground for invalidating the whole of the Deputy Magistrate's proceedings.

There is nothing in the law which enjoins the serving of notice upon all the co-sharers in an estate which may, in some shape or other, form the subject of a litigation under s. 318. That section says, that, after a Magistrate is satisfied that a dispute likely to induce a breach of the peace is about to take place within his jurisdiction, he shall record a proceeding stating the grounds of his being so satisfied, and shall call on all parties concerned in such dispute to give in written statements of their respective claims. It is quite clear that the other co-sharers who, Mr. Rochfort contends, have not been served, were not concerned in the dispute, for in that case they would have undoubtedly appeared in the Court below and taken steps to support the reference made by the Judge. The only parties concerned were those who did appear before the Deputy Magistrate: and although it may be technically said that Shamasundari got no notice, it is clear that she was all along aware as to what was going on for she appeared in Court and prayed to have witnesses examined on her behalf. That her case was not thoroughly gone into was her own fault, for the petition asking for the examination of the witnesses was made, as the Deputy Magistrate says, at the last moment; and in the exercise of the discretion allowed him by the law, he refused to grant any further postponement of the case.

Under the circumstances it appears to us that there is no ground on which to support the Judge's recommendation, and we accordingly decline to interfere with the order of the Deputy Magistrate.

Before Mr. Justice Bayley and Mr. Justice Mitter.

KHASRO MANDAR AND ANOTHER (PLAINTIFFS) v. PREMLAL AND OTHERS
(DEFENDANTS).*

1872
Aug. 24.

*Limitation—Act VIII of 1869 B. C.—Computation of the Period of
Limitation—English Calendar.*

THIS was a suit brought by Khasro Mandar and others, on the 3rd Asar 1278 Fasli (6th June 1871), to recover possession of 7 bighas of land in Hafazpore, on the allegation that they had acquired a right of occupancy over the land in dispute, and that they had been dispossessed by the mustafiz of the village on the 15th Asar 1277 Fasli (18th June 1870).

The defence set up was (*inter alia*) that the suit was barred by lapse of time.

The Moonsiff found on the evidence that the plaintiffs had been dispossessed on the 10th of Asar 1277 Fasli (13th June 1870), and held that, as the suit had been brought within one year from the date of dispossession, it was not barred by lapse of time. On the merits he held that the defendants had no right to eject the plaintiffs. He accordingly passed a decree in favor of the plaintiffs.

On appeal, the Subordinate Judge held that "it was a known fact that in Suba Behar the settlement and ploughing of the land commenced from the month of Asar. Besides, according to Act VIII of 1869, in Suba Behar, where the Fasli year is in use, the account of the new year commences from the month of Asar. Under these circumstances the date of the plaintiffs' dispossession ought to be calculated from the 1st of Asar; that the suit was brought after the month of Asar 1278, Fasli,—that is, after one year." Consequently the suit was barred by lapse of time. He accordingly dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Baboo *Budh Sen Sing*, for the appellant, contended that the suit was not barred, as the calculation was to be made by the English calendar—*Maharaja Jai Mangal Sing Bahadur v. Lal Bang Pal Sing* (1). According to such calculation the suit was within time.

Munshi *Mahomed Yusaf*, for the respondent, contended that there was nothing in s. 27, Act VIII of 1869 (B. C.) to shew that the calculation was

* Special Appeal, No. 488 of 1872, from a decree of the Subordinate Judge of Bhaugulpore, dated the 8th December 1871, reversing a decree of the Moonsiff of that district, dated the 15th August 1872.

1872

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to be made according to the English calendar, and there being nothing express in the Act, the custom of the district must be followed.

The Judgment of the Court was delivered by—

BAYLEY, J.—We think this case must be remanded to the Lower Appellate Court for trial on the merits.

It is found by the Lower Appellate Court as a fact that the cause of action arose from the 1st Asar, when it is the custom of the people of that part of the country to begin cultivation. S. 27, Act VIII of 1869, B. C., merely says that the suit is to be instituted within one year of the cause of action. It does not provide according to what calendar that year is to be calculated. On the contrary, cl. 2, s. 2. Act I of 1868, provides that “years” and “months” are to be calculated according to the British calendar, unless the contrary be expressed. Now, although that is an Act expressly referring to Acts passed by the Governor-General in Council, we think that, in the absence of any provision in the Bengal Council Act, the interpretation given in Act I of 1868 must be followed, and following that interpretation, the present suit is in time.

The judgment of the Lower Appellate Court is accordingly reversed, and the case remanded for trial on the merits.

The costs of this appeal and of the Lower Appellate Court will abide the ultimate result.

1872
Sept. 21.

Before Mr. Justice Macpherson.

THE QUEEN v. TARINICHARAN DEY AND OTHERS.

Evidence Act(I of 1872), s. 32, cl 2—Letter of Advice.

THE prisoner, Tarinicharan, was charged with forging for the purpose of cheating and using as genuine a forged railway receipt or bill of lading, for the purpose of obtaining from the East Indian Railway Company certain goods which had been entrusted to the Company to be carried from Delhi to Calcutta. The *Standing Counsel* for the prosecution sought to prove the delivery of the goods to the Railway Company by putting in a letter from the consignor at Delhi to his partner in Calcutta, advising the despatch of the goods. He submitted that the letter was a “document used in commerce, written or signed” by a person “whose attendance could not be procured without an amount of delay and expense which, under the circumstances of the case,” would be unreasonable, and therefore that it was relevant under s. 32, cl. 2 of the Indian Evidence Act (I of 1872). The Court refused to receive the evidence, and intimated a doubt whether such a letter would, under any circumstances, be receivable, since it was beyond the instances specified in the section.

Before Mr. Justice Macpherson.

L. HARRISON AND OTHERS v. A. H. HOPE.

1872
Dec. 2.

Limitation—Acknowledgment—Act XIV of 1859, s. 4—Service of Summons on Officer.

THE plaintiffs, who carried on business in Calcutta as tailors and outfitters, under the style of Ranken & Co., sued to recover from the defendant, an officer in the army, the sum of Rs. 1,267-3 for the price of goods sold and delivered, work done, and materials provided.

Service of summons was effected by transmitting a copy by post to the Commanding Officer of Secunderabad, where the defendant was stationed, who returned it with the defendant's acknowledgment endorsed thereon, and with a certificate that it had been duly served, but there was no affidavit of service. The service was held to be sufficiently proved.

The period of limitation had expired, but the plaintiffs relied on certain letters of the defendant as containing an acknowledgment of the debt. These letters were in answer to letters from the plaintiffs, stating the amount of the debt, demanding payment thereof, and threatening legal proceedings; but they themselves neither contained any mention of the sum due, nor any promise to pay the sum claimed. They were as follows:—

"I simply did not answer your letters because I had nothing satisfactory to say. You know, as well as I can tell you, the immense delays and difficulties attending contested legal measures. I trust, therefore, you will do me the favor to afford me a little longer time, and kindly instruct your lawyers not to commence legal measures, as they tell me they are instructed to do."

And again—

"You will hear finally from me in the first week of January, and I hope this will be satisfactory. I am obliged to you for the time already given."

The last letter was in the following terms:—

"Since I met with a nearly fatal accident in February, the progress of my affairs has for that reason been very slow, as for months I was incapable of writing, and even now do so with difficulty. Of course, I cannot prevent your suing me, but I should be much obliged if you would give a little longer delay before doing so."

Mr. Fergusson for the plaintiffs.

MACPHERSON, J., held that the defendant's letters, taken in connexion with those from the plaintiffs, formed a sufficient acknowledgment to take the case out of the operation of the Limitation Act.

Attorneys for the plaintiffs: Messrs. Berners, Sanderson and Upton.

Before Mr. Justice Glover and Mr. Justice Pontifex.

THE QUEEN v. ISREE PERSHAD SING.*

1872
Nov. 13.

Power of a Magistrate—Recognizance to keep the peace.

THE following case was submitted by the Sessions Judge of Gya for the opinion of the High Court:—

"The party (Isree Pershad Sing) was called upon by the summons to show cause why he should not be required to enter into his own recognizances to keep the peace for six months, the amount specified being Rs. 200. Subsequently, on appearing before the Magistrate, he was required to enter into his own recognizances to the amount of Rs. 4,000, and to find two sureties in Rs. 1,000 each, the period being at the same time extended to one year. It has been contended before me that the Magistrate was not authorized by law in either increasing the amount, altering the nature of the security, or extending the period for which it was required, but was bound to observe in all respects the wording of the summons. I should be glad to be favored with the opinion of the High Court upon the point."

The judgment of the High Court was delivered by—

GLOVER, J.—We think that the Sessions Judge is correct in his view of the law, and that the Magistrate was not justified in increasing the amount of security and in demanding sureties on a summons which provided only for a recognizance of much smaller amount, and made no mention of sureties at all.

The order of the Magistrate, directing recognizances to the amount of Rs. 4,000, and sureties to that of Rs. 1,000, to be taken, is quashed. If the Magistrate still thinks that heavier security should be taken than that first determined upon, he should issue a fresh summons, setting forth the amount intended to be taken, so that the party concerned may have full opportunity of showing cause against the order, if he wishes to do so.

*Reference No. 132, dated the 3rd October 1872, from the Sessions Judge of Gya.

Before Mr. Justice Kemp and Mr. Justice Pontifex.

IN THE MATTER OF THE PETITION OF SHAMASANKAR MAZUMDAR.*

1872

Nov. 19.

Code of Criminal Procedure (Act XXV of 1861), s. 318—Summoning Witnesses.

THE Assistant Magistrate of Goalundo, on perusal of a Police report and the evidence in certain other cases, held that there was a likelihood of a breach of the peace taking place with regard to a piece of land, and issued notices on Baboo Shamasankar Mazumdar and Rani Anandamayi Dasi as parties concerned in the dispute likely to give rise to a breach of the peace, to file written statements of their respective claims to actual possession. Both sides filed written statements. Shamasankar Mazumdar then petitioned the Court to summon witnesses on his behalf, alleging that he was unable by his own efforts to procure the attendance of his witnesses. The Assistant Magistrate merely ordered the petition to be placed on the record (*nathi shamil pesh*) and proceeded to examine witnesses tendered by Rani Anandamayi, and upon their evidence held that she was in possession, and passed an order retaining her in possession. In his judgment, the Assistant Magistrate remarked, with reference to the petition of Shamasankar Mazumdar, praying the Court to procure the attendance of his witnesses, that, in cases coming under Chapter xxii of the Criminal Procedure Code, he had no power to summon any witnesses.

Baboo *Nalitchandra Sen*, on behalf of Shamasankar Mazumdar, moved the High Court (BAYLEY and MITTER, JJ.), under s. 404 of the Code of Criminal Procedure, and obtained an order calling for the proceedings of the Assistant Magistrate of Goalundo, that the order passed by him might be quashed, on, among others, the following grounds, that the initiation of the proceedings was not based upon any legal evidence, and that the Assistant Magistrate ought to have summoned any witnesses required by the parties who were concerned in the dispute.

Baboo *Nalitchandra Sen* and *Girijasankar Mazumdar* for the petitioner.

Baboo *Durgadas Dutt* for Anandamayi Dasi.

Baboo *Nalitchandra Sen* contended that there was no evidence before the Magistrate; that Chapter xxii of the Procedure Code must be read with the other parts of the Code, not inconsistent with any of the special provisions in that Chapter.

* Miscellaneous Criminal Case, No. 194 of 1872, against an order of the Assistant Magistrate of Goalundo, dated the 4th September 1872.

1872

IN THE
MATTER OF
THE PETITION
OF SHAMA-
SANKAR MA-
ZUMDAR.

Baboo *Durgadas Dutt*, who was directed to confine his arguments to the second point, contended that the petitioner was not entitled to complain of the refusal to summon his witnesses, as he did nothing to press his application except filing a petition.

The Judgment of the High Court was delivered by—

KEMP, J.—The first point taken in this case is that the proceeding of the Magistrate under s. 318 of the Criminal Procedure Code is based upon the report of the Police officer alone, and such report not being legal evidence, all the proceedings subsequently taken by the Magistrate are without jurisdiction. On referring to the record, we find that the Magistrate did not proceed upon the report of the Police officer alone, in which case, perhaps, under the rulings of this Court, the objection might avail (1); but we find that the Magistrate refers to evidence taken in other cases, which we must assume he inspected, and he goes on to say that he is satisfied upon that evidence that there was a likelihood of a breach of the peace. This objection is therefore overruled.

The next objection is, that the petitioner has not had a proper hearing inasmuch as the Magistrate held that the law did not confer upon him the power to summon witnesses, in cases of this description, and when the petitioner prayed the Magistrate to summon his witnesses, no order beyond placing his petition on the record was passed. On referring to the judgment of the Magistrate, we find that he states that he can find no provisions in Chapter xxii for the summoning of witnesses. No doubt there is no mention in that Chapter of any particular provisions under which witnesses are to be summoned; but in cases coming under s. 318, oral evidence as to the fact of possession is always adduced; and it is the duty of the Court, if the parties cannot produce their witnesses, to issue summonses for their attendance. Now, in this case, it is clear that the petitioner petitioned the Magistrate, urging his inability to produce his witnesses, and asking for the assistance of the Court to summon these witnesses. It does not appear that any proper order was passed upon this application, and therefore it amounts to this that the petitioner has not had a proper hearing.

We therefore send back the case. The Magistrate will summon the witnesses for the petitioner, and, after hearing and considering their evidence, pass a fresh decision.

(1) See In the matter of the Petition of J. D. Sutherland, ante, p. 229.

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sold for arrears of rent, entered into an arrangement with the plaintiff, whereby, in consideration of a share in the purchase, he agreed to use his influence to urge on the sale, and to secure the purchase to the plaintiff. Under this arrangement the plaintiff became the purchaser of the talook, and the former proprietor obtained a share in purchase. A suit by the plaintiff to oust the under-tenants was dismissed; the plaintiff took only as a purchaser at an ordinary execution-sale, and did not obtain the benefit of s. 16 of Act VIII of 1865 (B. C.)

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—1869—VIII (B.C.)—*Lands occupied with Buildings, Suit for Enhancement of Rent of—Jurisdiction of Civil Court.*] A plaintiff brought a suit for enhancement of rent of lands occupied with buildings, under Act VIII of 1869 (B. C.).

Held per E. JACKSON, J., that though Act VIII of 1869 (B. C.) does not apply to lands used for building purposes, the Civil Court has jurisdiction to determine suits concerning the rent of such lands, and therefore had jurisdiction to entertain the present suit.

Held per MITTER, J., that the word "land" in Act VIII of 1869 (B.C.) is used in its ordinary sense, quite irrespective of the purposes for which it is applied, and that a suit for enhancement of the rent of land on which a house is built, will lie under Act VIII of 1869 (B. C.)

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to bodily possession. But a person is not in "actual possession" where the rents are paid by the actual occupier, not to him, but to an intermediate holder.	
All that is required to make a proceeding under s. 318 proper and valid, is that the Magistrate should be satisfied that a dispute exists, and he is to record the grounds of his being so satisfied. There is nothing which defines upon what grounds he shall be satisfied, or limits him to being satisfied by evidence given before him.	
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<i>Penal Code (Act XLV of 1860), s. 202] Where a person had been found guilty by a Magistrate of the offence of intentionally omitting to give information of an offence which he was bound to give, and on appeal the Judge found that there had been no evidence given</i>	

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of the omission, <i>held, per</i> KEMP, J. (GLOVER, J., <i>contra</i>) the Judge could not remand the case for additional enquiry under s 422 of the Criminal Procedure Code.	
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CRIMINAL PROCEDURE CODE, ACT (XXV of 1816), s. 435— <i>Powers of a Court of Session—Remand—Meaning of words "without enquiry."</i> Where an accused person has been discharged by a Magistrate under s. 250 of the Criminal Procedure Code, after enquiry into the case, the Court of Session cannot, under s. 435, remand the case for further enquiry.	
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OF THE PRIVY COUNCIL— <i>Costs for Translation and Printing—Interest.</i> When on appeal to the Privy Council it was ordered that the decrees of the High Court be reversed with £276 12s. 2d. costs, and that the decrees of the Zilla Court be affirmed with costs in the Courts below, in execution of the decree it was held that the decrees-holder was entitled to the costs of translation and printing incurred by him for transmission of the record to the Privy Council, and that he was entitled to interest upon those costs, but not to interest upon the said £276-12-2.	
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HINDU LAW— <i>Inheritance—Lunatic—Incurability.</i>	In order to ex-	clude a person from inheritance under the Hindu law on the ground of insanity, it is sufficient to show that when the succession opened he was mad, and not in a condition to perform the funeral oblations. Proof that his insanity was incurable is not necessary.	
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Maintenance of Widow—Declaratory Decree—Raising Issues not raised by Pleadings—Relief—Security for Costs of Appeal—Act VIII of 1859, s. 342.]	In a suit by a Hindu widow for a declaration of her right to maintenance out of her husband's estate which had been mortgaged to the defendant by the heir, the plaintiff prayed "that the rights of the plaintiff over the estate of her husband by way of maintenance, and for the expenses attendant on the marriage of her daughters, might be ascertained and declared; that it might be declared that the defendant took the mortgage subject to the plaintiff's right to maintenance and right to such expenses as aforesaid; that for such purpose all proper accounts might be taken; for an injunction; and for such further or other relief as might be necessary." No specific sum was asked for maintenance, nor was it stated on what portion of the estate the maintenance was sought to be charged, nor that the defendant took with notice of the plaintiff's assertion of her rights. The lower Court held that the suit ought to be dismissed as praying only for a declaration of right. No alteration in the form of the suit or in the issues in this respect was proposed for the plaintiff. Held, on appeal, that the Judge ought not to have dismissed the suit, but to have framed issues for the purpose of determining what should be allowed for the maintenance of the plaintiff and the expenses of the marriages, if the plaintiff should be found entitled to them. Where a plaintiff mistakes the relief to which he is entitled in his special prayer, the Court may afford him the relief to which he has a right under the prayer for general relief, provided it is such relief as is agreeable to the case made by the plaintiff.		
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Mitakshara—Succession—Females, Exclusion of—Impartible Joint Ancestral Property—Variance between Judge's Notes and Dispositions in Vernacular—Point arguable on appeal.]	A female cannot inherit an impartible ancestral estate belonging to a joint Hindu family governed by the Mitakshara, where there are any male members of the family who are qualified to succeed as		

heirs. This is a rule of law, and not dependent on custom. A custom modifying the law must be a custom to admit females; not a custom to exclude them.

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HINDU WIDOW, ALIENATION BY—*Champerly—Unfounded*

Charges of Extravagance and Profligacy—Costs.] *K D*, a Hindu widow, having applied to *H S* to aid her in leaving the family dwelling-house of her late husband, *G O C*, where, she alleged, she was improperly treated and placed under restraint by the plaintiff, her husband's sole surviving brother, *H S* at his own cost, enabled her to do so. She then applied to *H S* to advance funds for the payment of certain debts incurred by her in consequence of the plaintiff's refusal to pay her any portion of the family estate, to allow her a monthly sum for maintenance, and to manage and conduct for her a suit, which she proposed to institute to establish her right to a portion of the joint estate, and *H S* consented to do so upon certain terms, which were embodied in a deed by which *K D* assigned to *H S* all her right, share, and interest, as widow of *G O C*, in the joint estate, and in the accumulations thereof, and in the separate estate of *G O C*, and all benefit to be derived from the intended suit; on trust, first, to repay all the costs of the suit; secondly, to retain, by way of remuneration for managing the suit, one-half of what might be recovered therein; and, thirdly, to hold the residue as security for repayment, with interest at 12 per cent. of the sums advanced by *H S*; the surplus after satisfying all such sums to be paid to *K D*. Then *K D*, with the aid and under the management of *H S*, brought a suit against the plaintiff and other members of the joint family of *G O C*, for a declaration of her rights under the will of his father *R C*, and for the administration of *G O C*'s share of the joint estate. The result of this suit was that *K D* (was among other things) declared entitled as a Hindu widow to Rs. 1,01,302-14-10, in respect of the accumulations of the joint property, between the date of *R C*'s and *G O C*'s deaths. The plaintiff paid the Rs. 1,01,302-14-10 into Court under an order made in the suit. *K D* subsequently obtained an order under which she took this sum out of Court, notwithstanding that the plaintiff applied for an injunction to restrain her taking it out. Upon her obtaining that order, the plaintiff, as immediate reversionary heir of *G O C*, instituted the present suit against *K D* and *H S*, to restrain *K D* from taking the Rs. 1,01,302-14-10 out of Court, and to compel her to bring back any portion thereof which she might have already received; and for a declaration that the assignment to *H S* created no valid charge thereon. *Held* (following the decision in the case of *Grose v. Amirtamayi Dasi*) that the assignment to *H S* was not binding on the reversionary heirs of *G O C*, except as regards the charge on one moiety for expenses incurred and advances made by *H S*, whether by way of maintenance or otherwise, with interest thereon at 12 per cent.

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— WILL—*Deeds of Gift—Construction, Rules for—Maintenance of Son—Trusts—Life-estates—Estates tail.*] In construing transfers by gift among Hindus, a benignant construction is to be used, and the donor's intention carried out, if ascertainable, to the extent and in the form which the law allows. Thus, if an estate be given by a Hindu to *A* without words of inheritance, it will, in the absence of a conflicting context, give an estate inheritable as the law directs; if to it be added an imperfect description of it

as a gift of inheritance not excluding the inheritance imposed by law, an estate of inheritance would pass: if a gift be in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction is to be rejected; if a gift be to A and his heirs to be selected from a line other than that specified by law, and expressly excluding the legal course of inheritance, the gift is only good so far as consistent with the law—A would take a life-estate, and the other limitations would fail. All estates of inheritance created by gift or will, so far as they are inconsistent with the general law of inheritance, are void as such, and by Hindu law no person can succeed as heir to estates described in terms which in English law would designate estates tail.

In order to make a gift under a will good by Hindu law, the donee, except in the case of an adopted child, or a child *en ventre sa mère*, must be a person in existence capable of taking at the time when the gift takes effect. A child adopted after a man's death, in pursuance of a power given by him, is in contemplation of law begotten by that man.

The law of wills among Hindus is analogous to the law of gifts: and even if wills are not universally to be regarded in all respects as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer, and the persons to whom it can be transferred. A person capable of taking under a will must be such a person as could take a gift *inter vivos*, and, therefore, must, either in fact or in contemplation of law, be in existence at the death of the testator. *Sreemutty Soorjeemoney Dossee v. Denobondoo Mullick* distinguished.

Trusts are not unknown to Hindu law; they can be created for carrying out such intentions as the law recognizes.

There is no reason why a Hindu should not, by will, create an estate for life.

Where the testator left his property to A for life with remainders, showing that A should have no more than a life-estate, but that testator wished to tie up the estate by provisions in tail, *held*, that A could not be declared entitled to more than a life-estate.

Where a testator directed his property to go in a certain way on the "failure or determination" of estates created by him, it was held that such words contemplated the fact of those estates being legal and valid; and that as they were illegal and invalid, no effect could be given to the directions as to the further devolution of the property.

The will directed that, as to the personalty, the trustees were, after all annuities and legacies had fallen in and been satisfied, to stand possessed of, and interested in, the *corpus* in trust absolutely for the person or persons entitled under the limitations in the will to the beneficial or absolute enjoyment of the real property. The High Court gave the tenant for life the surplus of the interest remaining in the hands of the trustees after payment of the legacies and annuities, but excluded him from any right to the subsequently accruing interest: *Held*, that he was entitled to the interest of the personalty after such falling-in and satisfaction.

Where a son had received as a gift from his father property producing at the time Rs. 7,000 a year, their Lordships, without deciding whether a son could be deprived of maintenance, considered that he had received an adequate maintenance.

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All the existing parties interested in a will being before the Court, a decree can be made as to the rights of all parties. <i>Lady Langdale v. Briggs</i> distinguished.	
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HUNDI— <i>Custom—Drawer, Agent of Acceptor—Dishonor.</i>] The drawers of a hundi in favor of the plaintiff at Dacca (where all the parties to the hundi lived) were held not liable on proof that they were the Gomastas of the acceptor, that they had no interest in the Hundi, and that, according to custom in Dacca where the hundi was drawn and accepted, agents under such circumstances are not liable, although the agency does not appear on the hundi. They were also held discharged from liability, notice of dishonor not having been served on them till ten months after the due date of the hundi.	
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HUNDIS, PROPERTY IN— <i>Hundis sent to Agent for Realization.</i>] S E, the plaintiffs' agents in Calcutta, accepted hundis for Rs. 12,000 drawn upon them by a branch house of the plaintiffs' firm, and the plaintiffs at different times sent to S E hundis amounting in value to Rs. 11,400, with instructions to realize them, and to apply the proceeds towards payment of the Rs. 12,000. S E had paid Rs. 7,000 of this amount, and they had realized Rs. 6,400 out of the Rs. 11,400, when they stopped payment. At that time two unmatured hundis, for Rs. 2,500 each, remained in their hands, and these they endorsed over to the defendant after maturity in trust for their creditors. In an action by the plaintiff against the defendant to recover the two hundis. <i>Held</i> , that the hundis, having been sent to S E for the special purpose of enabling them to meet their acceptances for Rs. 12,000, remained the property of the plaintiffs subject to a lien of S E for Rs. 600.	
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JOINDER OF DIFFERENT CAUSES OF ACTION AGAINST DIFFERENT PARTIES—*Multifariousness.*] Under five different pottas, *A* granted to *B* patni leases of five different mehals. The rents of the mehals falling into arrears, the mehals were sold on two different dates. *A* purchased two of the mehals, *C* purchased two of the mehals, and *D* purchased one of the mehals.

In a suit brought by *B* against *A*, *C*, and *D*, to set aside the sales on the ground of irregularity.

Held, the suit was bad for multifariousness, and must be dismissed.

IMRIT NATH JHA v. ROY DHUNPAT SING BAHADUR ... 241

JUDGE OF HIGH COURT, POWER OF A SINGLE—*Appeals in Criminal Cases.*] A Judge of the High Court, sitting alone on the Appellate Side, has the power to hear and dispose of appeals in criminal cases.

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See ATTORNEY.

JURISDICTION—*Act XI of 1857—Act XVII of 1862, s. 4—Waging War against the Queen—Abetment—Penal Code (Act XLV of 1860), s. 121—Code of Criminal Procedure (Act XXV of 1861), s. 28—Warrant of Arrest under Reg. III of 1818—Effect and Weight of Evidence.*] Where the prisoner was charged with having, at Calcutta, abetted the waging of war against the Queen, and was tried at the Sessions Court of Patna, it was held that the Court of Sessions at Patna had Jurisdiction to try him, because he was a member of a conspiracy, other members of which had done acts within the district of Patna in pursuance of the original concerted plan, and with reference to the common object. The Court of Patna had jurisdiction also, because the prisoner had sent money from Calcutta to Patna by hundis, and, until that money reached its destination, the sending continued on the part of the prisoner.

The Governor-General, in issuing a warrant of commitment under Regulation III of 1818, does not in any way act judicially or as a Court of Justice, nor is he to be considered as having adjudicated that the person, placed under personal restraint, had been guilty of some specific offence. The proceeding is not in the nature of a conviction of the person placed under restraint, therefore the person so placed under restraint cannot, in any future proceeding taken against him, plead that he has been already tried, convicted, and punished.

Letters, &c., found in a man's house after his arrest, are admissible in evidence, if their previous existence has been proved.

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<i>Act XIV of 1859—Agreement—Money had and received.</i> A, B, and C being joint creditors of D, A and B received, in 1856, a payment on account in respect of their share in the debt. D having made default in payment of the balance, separate suits were brought against him by A, B, and C. The Court having held that the payment was a payment to all, A and B recovered more than their share, and C recovered less. A family suit for	

partition between A, B, and C was, in 1862, compromised, and it was agreed that all claims between the parties should be considered as settled, but it was agreed that if C should, out of an appeal brought by him against D, have any claim against A and B, that should be reserved. C's appeal was in 1863, unsuccessful, and in 1864, he brought an action against A and B for his share of the money paid in 1856. Held, that he was entitled to recover the amount which A and B had recovered against D in excess of their claim, and that the suit was not barred by the law of limitation.	
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MAHOMEDAN LAW —Pre-emption—Refusal to purchase when Property offered for Sale—Estoppel.] A Mahomedan offered to sell his share of certain property to a partner, and on the refusal of the latter to purchase the same, sold it to a stranger: held, the partner could not sue to enforce his right after the sale.	
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became surety under bond to Government for the treasurer of	
a Collectorate. The Collector yearly examined the accounts, and	
struck a balance which he certified to be correct. <i>B</i> on each	
such occasion executed a new bond, but the old bonds were	
not cancelled or given up. On subsequent enquiry, the treasurer	
was discovered to have embezzled moneys during each year. <i>Held</i>	
that, on such discoveries being made, <i>B</i> was still liable under	
the old bonds, there having been no novation.	
Where the Courts below had admitted evidence not properly	
admissible, the Judicial Committee examined the whole evidence,	
and being satisfied that there was, independent of that inadmis-	
sible evidence, sufficient to justify the decision of those Courts	
dismissed the appeal.	
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<i>provisions of—Suit to set aside the Sale.</i>] It is essential to the	
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In an action against a surety for principal and interest payable on a promissory note, held, overruling the decision of the Court below (Macpherson, J.), that the creditor, by the mere acceptance, without the knowledge or consent of the surety, of interest in excess of what was due on the note, bound himself to give time to the principal debtor, and thereby discharged the surety.	
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The defendant agreed with the plaintiff to take the plaintiff's mare "Bridesmaid" on "racing terms,"—all winnings to be divided equally between them, and the plaintiff to have the option of claiming a one-fourth share of any lottery in which she might be bought by or on account of the defendant; the plaintiff to	

keep and train "Bridesmaid" for Rs. 60 a month. Subsequently the plaintiff agreed to keep and train, for a like sum for each horse, five horses belonging to the defendant. The defendant having been posted as a defaulter, the plaintiff at the defendant's request advanced certain sums to the Secretary of the Calcutta Races to enable the defendant's horses to run. As security for the repayment of such advances, and of a sum of Rs. 4,486 6 which had become due to the plaintiff, and which included an item of Rs. 1,149 for "balance of bets and lotteries" and a smaller sum in respect of certain tickets in the "Secundra Raffle," the defendant gave to the plaintiff a letter of hypothecation of his five horses, whereby it was agreed that in case of the defendant's default, the plaintiff should be at liberty to sell the horses. The defendant made default, and the plaintiff advertised the horses for sale. On the same day the defendant wrote and gave to the plaintiff a letter, stating that, in consideration of the plaintiff's withdrawing the advertisement, and withholding the sale for a certain period, he would give the plaintiff a promissory note for the balance of his claim. A note for Rs. 7,000 was accordingly given by the defendant to the plaintiff. In the account delivered by the plaintiff to the defendant, he had by mistake over-credited the defendant with Rs. 744 in an item headed "cash received from the Secretary of the Calcutta Races, balance of racing account," and under which was included the following item "I. O. U., deducted from lottery account, Rs. 480." On receiving information of the error, the defendant gave the plaintiff another promissory note for Rs. 744. In an action on the notes brought under Act V of 1866, the plaintiff obtained a decree, which was set aside on the defendant's application, and leave was given to him to appear and defend. Written statements were then filed on the plaintiff's application.

Held by MACPHERSON, J., that the two promissory notes were given as a security for the whole of the plaintiff's claim; that the items for "balance of bets and lotteries" and for the "Secundra Raffle" being rendered illegal by the Lottery Act (V of 1844), part of the consideration for the notes was illegal, and no action was maintainable upon them. His Lordship, therefore, dismissed the plaintiff's suit.

On appeal, *held* by COUCH, C. J., that the promissory note for Rs. 7,000 was not vitiated by the Rs. 1,149 being part of the consideration for it: although that portion of the latter sum which was won by lotteries was obtained by an illegal transaction, it was not illegal for the defendant to receive the money, and having done so, to pay the plaintiff his share or to promise to do so. But the money paid in respect of the "Secundra Raffle," being money paid in execution of an illegal purpose, was an illegal consideration which disentitled the plaintiff to recover on the note. *Held* further, that the note for Rs. 744 was given upon good consideration. All the facts of the case being stated in the plaintiff's written statement, the Court might allow the plaint to be amended, and frame an issue as to what amount was due to the plaintiff in respect of the consideration for the note for Rs. 7,000.

Held by MARKBY, J., that both notes were good, inasmuch as the promise contained in them did not spring from, nor was it the creature of, the original illegal agreement, but was a separate agreement.

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— OF ORDER IN CRIMINAL CASE— <i>Fraud—Forfeited Property—Criminal Procedure Code, (Act XXV of 1861), ss. 184, —185—Penal Code (Act XLV of 1860) s. 174.</i> Where property of an absconding offender had been attached and declared to be at the disposal of Government under s. 184 of the Criminal Procedure Code, and the offender was subsequently convicted under s. 174 of the Penal Code, and such conviction was upheld on appeal, <i>held</i> , the High Court had no power to make any order with respect to such property.	
Where an order for release of the property so attached had been obtained from the High Court on an <i>ex-parte</i> application, and on an incorrect statement of facts, the High Court, on the application of the Government, cancelled such order.	
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RIGHT OF WAY— <i>Ownership of Soil—Injunction</i>] <i>G</i> , the owner of certain property, sold it in lots to different persons. The plaint-	

iffs purchased a portion of the property, and obtained from G a conveyance, in which the southern boundary of the land purchased by them was stated to be "the land of the said G, out of which he has allowed a passage six feet broad running almost straight west and east; and terminating on another passage leading, &c.;" the deed continued, "which two passages the said G hath granted and allowed, and doth hereby grant and allow to" the plaintiffs "their heirs, representatives, and assigns, and all other the purchasers of the northern portion of the said piece of land, &c., together also with the right of the two passages for ingress and egress hereinbefore mentioned." In a second deed, conveying another parcel of land to the plaintiffs, G said, with reference to the latter passage, "no one shall be able to throw sweepings or filth on the said road, or, make it unclean; if any one does at any time act thus, you will deal with him according to the laws in force." The defendant had become possessed of part of the northern portion of the land sold by G, and he also owned, under a distinct title, a house abutting on the lane in dispute, but having no doors opening into it. Shortly before the institution of the present suit, the defendant constructed three doors opening on to the lane, two of which were used for the purpose of cleaning two privies on the defendant's premises, and the third was used by the defendant and his servants as a means of access to the lane. In a suit by the plaintiffs seeking damages for trespass, and an injunction against the alleged wrongful user of the lane by the defendant, and praying that he might be ordered to close the three doors,—*held* (per COUCH, C. J. and MARKBY, J.; overruling the decision of MACPHERSON, J.), that the plaintiffs had not such a property in the soil of the lane as would entitle them to prevent the defendant from making new doors on to the lane, and to restrain him from using the doors already made; they had only a right of way: but an injunction was granted restraining the defendant from using his door-ways for the purpose of cleaning his privies or in any other manner so as to obstruct the free use by the plaintiffs of the lane.

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<i>having personal Knowledge—Title to Land between high and low-</i>		
<i>water Mark—Rescission of Contract—Parties.]</i> The defendant		
who for twelve years had occupied land as tenant, purchased the		
land at a sale by the receiver, but refused to complete the pur-		
chase on the ground of material mis-description in the advertise-		
ment of sale, in that a road and ghat, comprised within the bound-		
aries mentioned in the advertisement, were not the property of		
the parties whose land the Receiver purported to sell, and also that		
to make up the quantity of land as stated in the advertisement,		

viz., twenty bigas by estimation, land lying between high and low-water mark had been taken into calculation. The owners of the property sold having brought a suit against the defendant for specific performance, the defendant contended that the Receiver was a necessary party to the suit, and that the sale had been rescinded by a statement of the Receiver that he would forfeit the deposit in the event of the defendant not carrying out his contract. In support of his objection to quantity, the defendant relied on a Collectorate chitta as showing that the area of the land sold was only 9 bigas, 8 katas, 10½ chittaks, the same chitta, however, in giving the eastern boundary of the property, described it as lying "on the west of the low-water of the Ganga."

Held, that there had been no rescission of the contract; that the plaintiffs, being owners of the land down to low-water mark, were entitled to all subsequent accretions, and were, therefore, entitled to include in their measurement all land down to low-water mark; and, having regard to the fact that the defendant was personally acquainted with the property sold, it was not open to him to repudiate the contract on the ground of mis-description. The plaintiffs were entitled, therefore, to a decree for specific performance.

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— FOR LAND—Act VIII of 1859, s. 5— <i>Jurisdiction—Mortgage—Form of Decree.</i>] A suit brought upon a mortgage praying for a decree for the amount due thereunder, and that in default of payment the land mortgaged may be sold, is a suit for land within the meaning of s. 5 of Act VIII of 1859, and is rightly brought in the Court of the district within which the land is situate.		
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— ENHANCEMENT OF RENT OF LAND COVERED WITH BUILDINGS—Act X of 1859, s. 23, cl. 4— <i>Jurisdiction of Revenue Court.</i>] A suit for enhancement of rent of land covered with buildings will not lie in the Revenue Court under cl. 4, s. 23 of Act X of 1859, but is cognisable only by a Civil Court.		
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— OF A NAZIR, SUIT AGAINST, FOR DAMAGES— <i>Act VIII of 1859, s. 223.</i>] The surety of a Nazir who had entered into the usual bond of indemnity with the Collector of the district against all losses caused by the Nazir during the tenure of his office, was held not liable, at the suit of a person whose property had been misappropriated by the Nazir, to make good any loss sustained by such person.	
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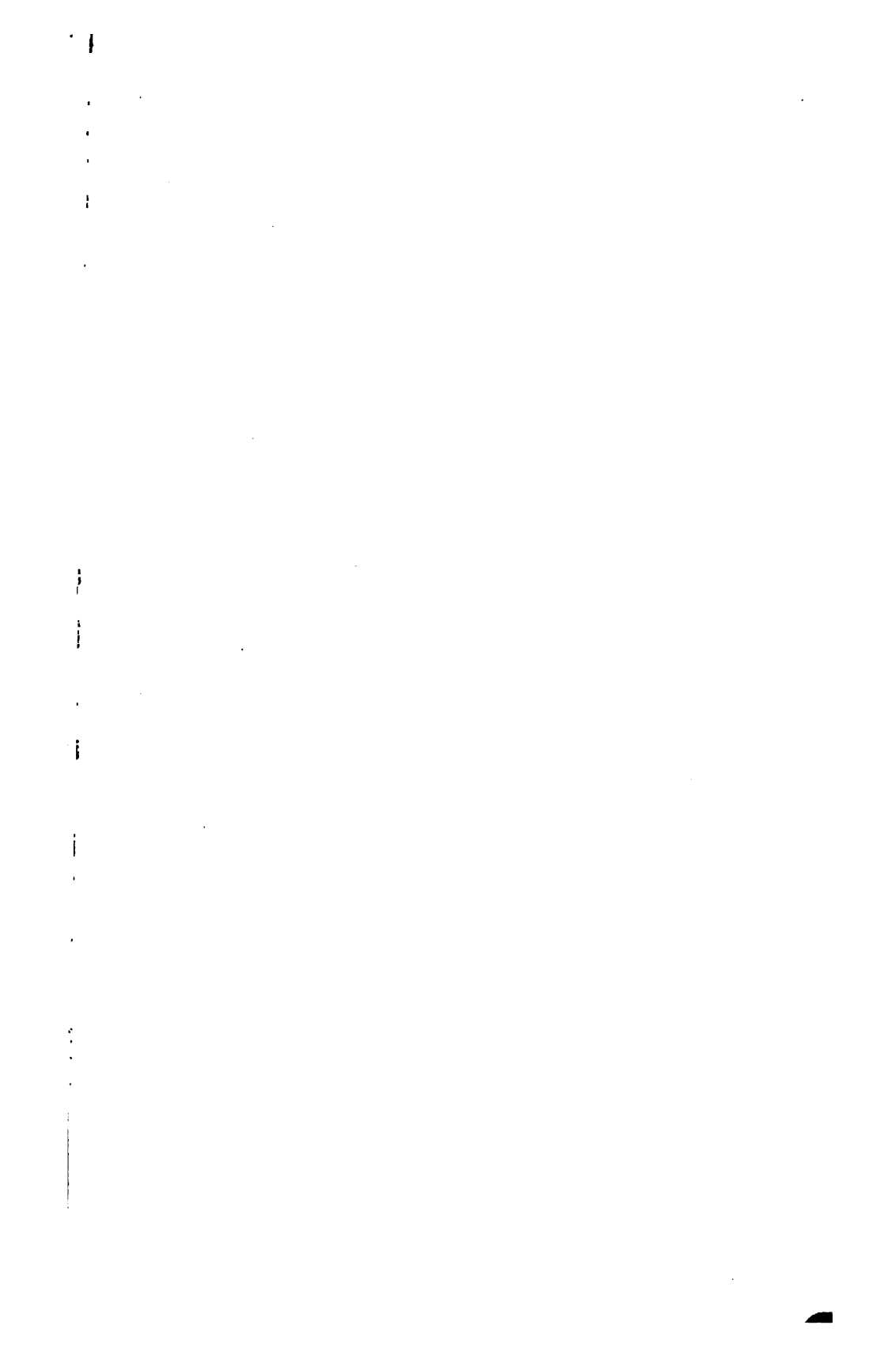
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